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ACTION.

1. BY ADMINISTRATOR DE BONIS NON TO RECOVER ASSETS OF THE ESTATE Where the first administrator has surrendered to the defendants, who were bankers, certificates of deposit, which they had given to the deceased, without receiving full payment, the administrator *de bonis non* cannot maintain an action against them for the balance. The transaction is the same as if the first administrator had been paid in full and had re-deposited a part of the money. In that case the defendants would be liable to him, and he would be liable over to the plaintiff, but there would be no liability as between the defendants and the plaintiff. *Brooks v. Mastin*, 58.

2. A PERSONAL ACTION cannot be united with one brought in a representative capacity. *Mertens v. Loewenberg*, 208.

3. REMEDY TO ENFORCE PAYMENT OF POLICEMEN'S SALARY IN KANSAS CITY. A policeman appointed by the board of police commissioners of the City of Kansas, under the act of March 27th, 1874, establishing the board and authorizing the appointment of a police force, (Sess. Acts 1874, p. 327,) could not, without first obtaining from the board a warrant on the city treasury, maintain an action against the city for his services. If he could not get either his pay or a warrant for his pay, his remedy was by mandamus against the board. *Sanford v. The City of Kansas*, 466.

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ADMINISTRATION.

1. ADMINISTRATOR'S SALE: REPORT OF SALE: INSUFFICIENT DEED: PURCHASER'S EQUITY FOR A DEED. In an action of ejectment it appeared by the records of the probate court that a sale of several parcels of land had been made by an administrator in obedience to an order of the court, and had been approved by the court. It appeared, also, that the purchase money had been paid in full, and the purchaser had been put in possession of the tract in controversy by the administrator, but the deed, which he received, did not in terms describe the land. It did, however, use the description employed in the report of sale, which, after enumerating several tracts by

their numbers, stated that they contained in the aggregate 353 74-100 acres. It was shown by parol evidence that all the lands of the decedent amounted to exactly 353 74-100 acres, including the tract in controversy, and that they constituted a farm, the dwelling house and orchard of which were on this tract. Defendants claiming under this sale; *Held*, that, as *bona fide* purchasers, they had rights which a court of equity would enforce; that, although for want of explicitness in the description, the administrator's deed might not convey the legal title, yet the same degree of particularity is not required in a report of sale as in a deed, and since it sufficiently appeared that the tract in controversy was in point of fact sold and paid for, as against the plaintiffs, who were heirs of the decedent, defendants were entitled to the land; and accordingly there was a decree vesting the title in them. *Gilbert v. Cooksey*, 42.

2. ADMINISTRATOR DE BONIS NON: HIS RIGHT TO RECOVER ASSETS OF THE ESTATE. In a suit brought by an administrator *de bonis non* for the amount of a debt due to the deceased, for which the debtor has given his promissory note payable to the first administrator, the plaintiff cannot recover on the note without showing that it has come into his possession; neither can he recover on the original consideration without showing that the note has not been paid to the first administrator or some assignee, or surrendering the same for cancellation. *Brooks v. Mastin*, 58.

3. ——: ——. Where the first administrator has surrendered to the defendants, who were bankers, certificates of deposit, which they had given to the deceased, without receiving full payment, the administrator *de bonus non* cannot maintain an action against them for the balance. The transaction is the same as if the first administrator had been paid in full and had re-deposited a part of the money. In that case the defendants would be liable to him, and he would be liable over to the plaintiff, but there would be no liability as between the defendants and the plaintiff. *Ib.*

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LIABILITY OF SURETIES ON EXECUTOR'S BOND. See State ex rel. Wight v. Modrel, 152.

JURISDICTION OF BARTON COUNTY PROBATE COURT. See Julian v. Ward, 153.

ADVERSE POSSESSION.

1. CHANGE OF POSSESSION FROM FRIENDLY TO ADVERSE: PARTITION. Proceedings for the partition of land brought by persons holding possession under license from the true owner, and to which he is no party, followed by a sale to one of the petitioners, and continued exclusive possession by him will not give the possession an adverse character. In order to convert a friendly or subordinate into an adverse possession, in any case, the intention to make the change must be distinctly made known to the true owner. *Budd v. Collins*, 129; *Fulkerson v. Brownlee*, 371.

2. TITLE BY: ACTION OF DAMAGES. Uninterrupted possession of land

under claim of ownership for ten years, confers such title as will enable the possessor to maintain an action of damages for injury done to the land by the improper construction of a railroad adjacent to it, provided the possession is continued down to the institution of the suit. *Swenson v. The City of Lexington*, 157.

3. A TRUSTEE'S POSSESSION NOT ADVERSE TO BENEFICIARY. The possession of a trustee will not be deemed adverse as against his *cestui que trust*, unless there has been an open disavowal of the trust fully and unequivocally made known to the beneficiary. The application by the trustee of the whole income of the trust property to his own use for a period of twelve years, does not, it seems, amount to such disavowal. *Goodwin v. Goodwin*, 617.

ALTERATION.

OF PROMISSORY NOTE. See Smith v. Ferry, 142; Moore v. Hutchinson, 429.

AMENDMENT.

1. NOT ALLOWED, WHEN IT WOULD CONVERT AN ACTION EX-CONTRACTU INTO AN ACTION EX-DELICTO. In a suit by the claimant of personal property against the obligors in a bond, given by the plaintiff in an execution to indemnify the sheriff against any liability incurred by him in the sale of the property under the execution, where the original petition seeks to recover damages for breach of the conditions of the bond, the claimant will not be allowed to file an amended petition, even before answer filed, which seeks to recover damages from the sheriff for the wrongful sale of the property, and from the obligors in the bond for their instigation and procurement of such sale. The cause of action, as stated in the former petition, is *ex contractu;* as stated in the latter petition, *ex delicto.* In order to a recovery upon the former petition, it would be necessary to prove the bond; to a recovery upon the latter petition, this would not be requisite. An amended petition which states an essentially different cause of action from that stated in the original petition, and which requires different proof will not be allowed. Wag. Stat., sec. 7, p. 1035, which provides for the amendment of a petition, without costs and of course, before answer filed, will not justify such an amendment. *Lottman v. Barnett*, 62 Mo. 159, distinguished. *Lumpkin v. Collier*, 170.

2. OF RETURN ON EXECUTION. The validity of a judgment by default being collaterally called in question on the ground that the sheriff's return failed to show proper service of the summons, after the submission of the collateral cause, but before its decision, by leave of court, the sheriff amended his return so as to show a good service. *Held*, that this amendment was conclusive. *Dunham v. Wilfong*, 355.

APPEAL.

1. FROM JUSTICE'S COURT, PREVENTED BY JUSTICE'S ABSENCE: APPELLANT'S REMEDY. When a party takes the proper steps to secure an appeal from a justice of the peace in time, but fails on account of the absence of the justice, his remedy is to obtain a rule upon

the justice from the court which would have jurisdiction of the appeal, requiring him to allow it. Wag. Stat. p. 849, § 10. An appeal allowed after the time has expired, without such rule, is irregular and is properly dismissed on motion in the upper court. *Pearson v. Carson*, 569.

2. THE STATE'S RIGHT OF APPEAL IN CRIMINAL CASES. Where a motion in arrest of judgment in a criminal case has been sustained, and the prisoner ordered discharged, on the ground that at the time of the commission of the offense the defendant was a slave, and as such not liable to punishment, the State cannot appeal. Her right of appeal is limited to those cases, where, either on motion to quash, on demurrer or on motion in arrest of judgment, the indictment has been adjudged to be insufficient either in form or substance. *The State v. Bollinger*, 577.

FROM A JUSTICE'S JUDGMENT BY DEFAULT. See Borgwald v. Fleming, 212.

ATTACHMENT.

1. INTERPLEADING IN ATTACHMENT. Wagner's Statute, section 52, page 192, which provides that in attachment proceedings "any person claiming property, &c., may interplead," includes only those who claim to own the property attached. A garnisher of a debt has no such claim. *Abernathy v. Whitehead*, 28.

2. JUDGMENT IN ATTACHMENT. Where the judgment against the defendant in an attachment suit is general, the court cannot direct that the attached property be first sold. The statute expressly directs that the execution, in such case, shall be a common *fi. fa.* Gen. Stat. 1865, p. 58. *Philips v. Stewart*, 149.

3. OF GROWING CROPS FOR RENT. The growing crop of a tenant is subject to attachment by the landlord for rent due. (*Hubbard v. Moss*, 65 Mo. 647.) *Crawford v. Coil*, 588.

4. OF NOTE PREVIOUSLY TRANSFERRED AS COLLATERAL SECURITY: TRANSFER BY DELIVERY ONLY. One who takes a note as collateral security for a pre-existing debt due him from the payee, is entitled to hold it as against a subsequently attaching creditor of the payee. The fact that the note, though payable to order, is not indorsed by the payee, but is transferred by delivery only, will not affect his right. *Davis v. Carson*, 609.

ATTORNEY.

DELEGATION OF CITY ATTORNEY'S POWERS. See City of Kansas v. Flanagan, 22.

ATTORNEYS AT LAW.

See Lawyers.

BANKRUPTCY.

1. EXECUTION SALE PENDING BANKRUPTCY PROCEEDINGS. A sale of the property of a bankrupt under execution upon a judgment rendered and levy made prior to the adjudication of bankruptcy, is valid. *Fisher v. Lewis*, 629.

2. FORMER JUDGMENT: THE RELATION OF ASSIGNEE IN BANKRUPTCY TO A SECURED CREDITOR. The judgment in a suit brought by an assignee in bankruptcy to set aside as fraudulent a deed made by the bankrupt, is not binding upon a creditor of the bankrupt who had reduced his demand to judgment and had thus acquired a lien prior to the adjudication of bankruptcy, and was not made a party to the assignee's suit. Such a creditor having an interest hostile to the interests of the general creditors, the assignee could not be considered to have represented him in the prosecution of the suit. *Ib.*

BILL OF EXCEPTIONS.

CHANGE OF VENUE. Exceptions to the action of the trial court in refusing to allow a change of venue, will not be noticed by the Supreme Court unless preserved by a bill of exceptions taken at the term at which the change is refused. *The State v. Ware*, 332.

BILL OF EXCHANGE.

NON-ACCEPTANCE OF DRAFT DRAWN AGAINST CONSIGNMENT OF GOODS: NO ACTION LIES BY PAYEE AGAINST DRAWEE. It is well settled that no action lies in favor of the payee against the drawee for non-acceptance of a draft, and the rule is not changed by showing that the draft was given in payment for goods bought of the payee by the drawer, and consigned by the latter to the drawee, and was drawn against this consignment, that the drawee was notified that the draft had been so drawn, and that he afterwards received the goods and sold them for more than enough to pay the draft. *Clements v. Yeates*, 623.

BONDS.

1. SURETIES, THEIR LIABILITY THEREON. In a suit upon an executor's bond, it is no defense to a surety that he signed the bond upon the parol promise of the executor to procure additional sureties, and furnish the sureties with an indemnity bond. (Following *State to use, &c., v. Potter*, 63 Mo. 212, and *Brown v. Baker*, 64 Mo. 167.) *The State ex rel. Wight v. Modrel*, 152.

2. BOARD OF EDUCATION: MECHANIC'S LIEN; BREACH OF BUILDER'S BOND. A board of education having contracted with a builder for the erection of a public school house, took from him a bond conditioned to secure the faithful performance of the contract. The builder having procured materials to be furnished and work to be done on the building, failed to pay for them, whereupon the laborers and material men brought their actions to enforce mechanics' liens against the building, and obtained judgments, and the board paid the judgments. In an action on the bond; *Held*, that these facts constituted a breach of its conditions, and the board was enti-

tled to recover the amounts so paid. *The State to use of the Board of Education v. Tiedemann*, 515.

SEE COUNTY BONDS.

RECOGNIZANCE.

CHANGE OF VENUE.

SEE VENUE.

CIRCUIT CLERK.

A CERTIFICATE OF ACKNOWLEDGMENT of a deed ran thus: "State of Missouri, Schuyler county, ss.; Be it remembered that before the undersigned, circuit clerk, comes L. H. C.," &c.; *Held*, that it sufficiently appeared that the certificate was granted by the clerk of the circuit court of Schuyler county. *Sidwell v. Birney*, 144

CITY ATTORNEY.

HIS POWERS CANNOT BE DELEGATED, WHEN. The charter of the City of Kansas provided that "a warrant shall issue in favor of the city * * for a violation of any ordinance * * when any person shall make oath or affirmation that such a violation has been committed, or upon information by the city attorney." Neither the charter nor any ordinance of the city authorized the appointment of a deputy city attorney; *Held*, 1st, that the power thus provided for must be exercised by the city attorney in person, and could not be delegated to a deputy; 2nd, that a complaint made by a deputy could not afterwards be adopted by the city attorney as his own. *City of Kansas v. Flanagan*, 22.

COMMON CARRIER.

ACTION AGAINST, FOR DELAY IN TRANSPORTATION OF CATTLE: MEASURE OF DAMAGES. In an action against a common carrier for damages occasioned by delay in the transportation and delivery of cattle, the measure of damages is the difference between the market price of the cattle when they arrived at their destination and the market price when they should have arrived, together with compensation for the difference between the shrinkage in weight actually sustained by the cattle and that which would have occurred if there had been no delay. (*Sturgeon v. R. R. Co.*, 65 Mo. 570.) Evidence is not admissible to show that between the time of their arrival and the time when they were sold, a decline in the market took place. *Glascock v. The Chicago & Alton Railroad Company*, 589.

CONSIDERATION.

ASSIGNMENT OF VOID PATENT CONSTITUTES NONE. See Keith v. Hobbs, 84.

A CASE IN WHICH THE CONSIDERATION OF A CONTRACT WAS HELD SUFFICIENT. Kitchen v. The St. Louis, Kansas City & Northern Railway Company, 224.

PAYMENT OF USURIOUS INTEREST, SUFFICIENT TO SUPPORT PROMISE TO EXTEND TIME OF PAYMENT OF A DEBT. See Stillwell v. Aaron, 539.

CONSIGNMENT.

NON-ACCEPTANCE OF DRAFT DRAWN AGAINST CONSIGNMENT OF GOODS: NO ACTION LIES BY PAYEE AGAINST DRAWEE. It is well settled that no action lies in favor of the payee against the drawee for non-acceptance of a draft, and the rule is not changed by showing that the draft was given in payment for goods bought of the payee by the drawer, and consigned by the latter to the drawee, and was drawn against this consignment, that the drawee was notified that the draft had been so drawn, and that he afterwards received the goods and sold them for more than enough to pay the draft. *Clements v. Yeates*, 623.

CONSTABLES.

1. CONSTABLES are State as contradistinguished from municipal officers. *The State ex rel. Attorney-General v. McKee*, 504.

2. IN THE CITY OF ST. LOUIS: THE SCHEME AND CHARTER: GENERAL WELFARE CLAUSE. It is doubtful if the board of freeholders who framed the scheme and charter for the separation and government of the city and county of St. Louis, intended, by the general welfare clause of the charter, to confer upon the city the power to pass any ordinance that would conflict with and repeal so much of the act of March 24th, 1875, concerning constables, as relates to the city of St. Louis; but if they did, they transcended the powers given them by article 9 of the Constitution. Ordinance No. 10,744, providing for the election of constables in the city of St. Louis, being in conflict with this act, is, therefore, void, and persons elected under it are not entitled to fill the office of constable. *Ib.*

IN THE CITY OF ST. LOUIS, HOW RELEASED FROM LIABILITY FOR FALSE LEVY. See Dodd v. Thomas, 364.

CONSTITUTIONAL LAW.

1. EXTENDING CITY LIMITS: EXEMPTING NEW TERRITORY FROM TAXATION: CONSTITUTIONAL LAW. The 3rd section of the act of March 11th, 1873, extending the limits of Kansas City, (Acts 1873, p. 282,) declared that no subdivision of land in the annexed territory containing over five acres should be subject to city taxation. *Held*, that this did not violate those provisions of the constitution which prohibit the exemption of private property from taxation, and require all to be taxed in proportion to its value. The Legislature had a right to grant the extension on such terms as it thought proper. *Held, also*, that if this section were unconstitutional, the whole act would be, as immunity from city taxation for such tracts was the only condition on which they were annexed; so that whether section 3 was constitutional or not, such tracts were not liable to city taxation. *The City of Kansas v. Cook*, 127.

2. BACK TAX ACT OF 1877 CONSTITUTIONAL. The act of 1877 to provide for collection of delinquent taxes, is not unconstitutional as being retrospective in its operation. *Wellshear v. Kelley*, 343.

3. DEVISE TO OLD SCHOOL BAPTISTS VOID UNDER THE CONSTITUTION OF 1865. The Old School Baptist Church of Flint Hill, in Ralls county, Missouri, is a religious sect, order or denomination within the meaning of section 13, article 1, of the Constitution of 1865, and was, therefore, not incapable under that section of receiving a devise, notwithstanding it was but a local congregation uncontrolled by any general ecclesiastical organization. *Boyce v. Christian*, 492.

4. TREBLE TAXATION BY WAY OF PENALTY FOR FRAUD: SUMMARY PROCEEDINGS: TRIAL BY JURY: DUE PROCESS OF LAW. Section 34 of the revenue law, (Wag. Stat., p. 1165,) provides in substance that upon complaint from the assessor that any person has given in a false list of his property for taxation, with intent to defraud, the board of equalization shall notify the party of the charge, specifying the particulars in which the list is alleged to be false, and shall fix a time for a hearing, when the party shall have the right to appear and defend; and if the charge is sustained, it shall be the duty of the board to ascertain the true amount and value of all his property subject to taxation, and, by way of penalty for furnishing the false list, to assess a treble tax against him. The board of equalization consists of the three judges of the county court, the county assessor and the county surveyor, and its decision is final, except that for error apparent upon the face of the proceedings *certiorari* will lie to the circuit court; *Held*, that the act is not unconstitutional, either as depriving the accused of the right of trial by jury, or as depriving him of his property without due process of law. *The State ex rel. Ferguson v. Moss*, 495.

5. TITLE OF STATUTE: CONSTITUTIONAL LAW: HANNIBAL CITY CHARTER. Under the title "An act to consolidate into one act the various acts in relation to the charter of the city of Hannibal" any legislation relating to the city of Hannibal may be enacted without violating § 32 of article 4 of the constitution. That section prohibits the enactment of any law relating to more than one subject and requires the subject to be expressed in the title. The insertion in an act entitled as above, of a requirement that the county in which the city is situated in a certain contingency shall pay to the city a certain portion of the taxes collected for county purposes, does not render the act obnoxious to this provision of the constitution. *The City of Hannibal v. The County of Marion*, 571.

6. HANNIBAL CITY CHARTER: MAINTENANCE OF STREETS, ROADS, BRIDGES AND PAUPERS: PARTITION OF COUNTY REVENUE: CONSTITUTIONAL LAW. The charter of the city of Hannibal imposed upon the city exclusively the duty of making and maintaining the streets, roads and bridges within its own limits, and of maintaining and supporting its own poor. (Acts 1873 p. 254, article 8, § 1.) With a view of exempting the citizens of Hannibal from the payment of a county tax to be used for the like purposes in the county of Marion outside the limits of the city, the act further provided that whenever the county court should expend any money on roads or bridges or paupers outside the limits of the city, the county should pay over to the city a sum which should bear the same proportion to the amount so expended as the assessed value of the property in the city should bear to that of the property in the remainder of the county. *Held*, on the authority of *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 5, and the *State ex rel. the Police Commissioners v. St. Louis Co. Ct.*, 34 Mo. 546, that the Legislature had the power to direct the county revenue to be disbursed in this manner. *Ib.*

8. CONFISCATION OF RENTS BY MILITARY AUTHORITIES: CONSTITUTIONAL LAW, FEDERAL AND STATE. The court adheres to its decision in this case heretofore reported in 64 Mo. 564, against the validity of the act of Congress of March 3rd, 1863, under which the plaintiff's rents were confiscated by the military authorities of the United States.

The court also holds that no defense can be made to the action, based on section 4, article 11 of the Missouri Constitution of 1865. A State can no more deprive an owner of his property without due process of law by constitutional provision than by an ordinary act of legislation. *Clark v. Mitchell*, 627.

LAWYERS' LICENSE TAX, UNIFORMITY OF TAXATION. See The City of St. Louis v. Sternberg, 289.

WAIVER OF CONSTITUTIONAL QUESTION BY ACT OF PARTIES. See Dodd v. Thomas, 364.

ST. LOUIS SCHEME AND CHARTER. See The State ex rel. Attorney-General v. McKee, 504.

ST. LOUIS CITY JUSTICE OF THE PEACE ACT OF 1877, NOT A LOCAL LAW. See The State ex rel. Monahan v. Walton, 556.

CONTEMPT

OFFICER FURNISHING INTOXICATING LIQUORS TO JURORS IS GUILTY OF. See The State v. West, 401.

CONTINUANCE.

1. THE court holds that under the circumstances detailed in the opinion, the trial court did not abuse its discretion in refusing a continuance asked for by the accused, on the ground of the absence of a witness. *The State v. Williams*, 110.

2. REQUISITES OF AFFIDAVIT. A defendant who has on his own application obtained a continuance from one term to another, must state in his affidavit for a further continuance, the names of his witnesses and the facts which they are expected to prove. Wag. Stat., §§ 6, 8, pp. 1039, 1040. An application which has been refused is not an "application" within the meaning of these sections. *The State v. Maguire*, 197.

3. DISCRETION OF TRIAL COURT. The discretionary power of the circuit court to grant a continuance will only be reviewed where it is manifestly abused. *Ib.*

4. ———. Under ordinary circumstances this court will not interfere with the exercise by the trial court of its discretion in refusing continuances. But in the present case, it appearing by the affidavit of the officer, that after he had served two subpœnas on the witnesses needed for the defense, both at the same term of court, they had secreted themselves to avoid attachment, a conviction of murder was set aside, notwithstanding the record showed that the defendant had previously had a number of continuances. This result was the more readily reached because the court, upon examination of

the evidence, was impressed with the belief that the jury had been influenced by political party feeling in finding their verdict. *The State v. Walker*, 274.

CONTRACTS.

1. DEPENDENT CONDITIONS. A and B entered into a written contract, whereby B, in consideration of certain work to be done by A, on his premises, agreed to give him two horses. A having failed to do the work as agreed, a supplementary contract was made, wherein it was agreed that in consideration of B furnishing A with money to pay his taxes and purchase material for the prosecution of the work, the former was to retain the horses after the work was all done, until he should be repaid the amount of his outlays. In a suit by A on the first contract, *Held*, that the right of B to retain the horses under the supplementary contract was dependent on his advancing the money, and unless such advancements were shown to have been made, this contract constituted no defense to the action. *Moore v. Waldo*, 277.

2. RAILROAD CONSTRUCTION CONTRACT: RIGHT OF WAY. A sub-contractor for the construction of a railroad is not bound to procure the right of way; and if he is prevented from fulfilling his contract by reason of the fact that the company has not a right of way over some of the lands through which the road is to run, and the owners refuse him permission to enter and do the work, this is a sufficient excuse for his failure. *Bean v. Miller*, 384.

3. PAYMENT IN INSTALLMENTS: DEFAULT OF PAYOR: RIGHTS OF CONTRACTOR. Where work is done under a contract which provides for payment by installments at stated periods, and the payments are not made, the contractor may quit the work and he will then be entitled to recover for all that he has done at the contract rates; and this notwithstanding the contract provides in express terms, that the work shall be steadily prosecuted without intermission to final completion. *Ib.*

4. PAYMENT TO BE MADE ON ENGINEER'S ESTIMATES. Where it is stipulated in a contract that the work to be done under it is to be paid for upon the estimates of an engineer, to be made at stated times, if the engineer makes only approximate estimates, and the contractor is prevented from completing the work through the fault of the other party, he may recover for the whole amount of work done, as well that of which no estimate has been made as that which has been estimated. *Ib.*

5. A PROMISSORY NOTE TREATED AS A MERE MODIFICATION OF A PRIOR WRITTEN CONTRACT. By the terms of a written contract for the sale of certain cattle, a part of the purchase money was to be paid in advance. When the time for payment came the seller instead of exacting the money, accepted a note, but there was no evidence that it was accepted as payment. Subsequently the purchaser refused to receive the cattle, alleging fraudulent misrepresentation as to their quality and condition. The seller having sued upon the note; *Held*, that he could not maintain his action. The acceptance of the note amounted only to an alteration of the original contract by extending the time of payment of the sum agreed to be paid in advance, and the plaintiff's cause of action, if any, was upon

the contract for failure to take and pay for the cattle. *Thornberry v. Thompson*, 481.

6. BOARD OF EDUCATION: MECHANIC'S LIEN: BREACH OF BUILDER'S BOND. A board of education having contracted with a builder for the erection of a public school house, took from him a bond conditioned to secure the faithful performance of the contract. The builder having procured materials to be furnished and work to be done on the building, failed to pay for them, whereupon the laborers and material men brought their actions to enforce mechanics' liens against the building, and obtained judgments, and the board paid the judgments. In an action on the bond; *Held*, that these facts constituted a breach of its conditions, and the board was entitled to recover the amounts so paid. *The State to use of the Board of Education v. Tiedemann*, 515.

7. IMPLIED ASSUMPTION OF DEBT BY ACCEPTING A DEED RECITING SUCH ASSUMPTION. The acceptance of a deed poll containing a recital that the land conveyed is subject to a mortgage which the grantee assumes, or agrees to pay, imposes a duty on the grantee, and the law implies a promise to perform it, on which, in case of failure, an action can be maintained. *Heim v. Vogel*, 529.

8. AGREEMENT TO ASSUME JUNIOR ENCUMBRANCE BY ONE WHO AFTERWARDS PURCHASES UNDER SENIOR. A having purchased land, and, by a clause in the deed, assumed the payment of an outstanding deed of trust, afterwards bought the same land at a sale under an execution, the lien of which ante-dated the deed of trust, and then executed a second deed of trust. The first deed of trust was on record at the time the second was executed, and the second in express terms, referred to the deed to A. Sales having taken place under both deeds of trust, in a contest between the respective purchasers; *Held*, that after the purchase under the execution the land remained in A's hands as much bound by the first deed of trust as if he had himself executed it; and a purchaser under the second, having from A's deed and the records full notice of the facts, took no better title than A. *Ib.*

CONTRACTS OF A CORPORATION WITH ITS DIRECTORS, VOIDABLE, NOT VOID. See Kitchen v. The St. Louis, Kansas City & Northern Railway Company, 244.

CONVERSION.

GUARDIAN AND WARD: SALE BY GUARDIAN OF WARD'S PROPERTY: ACCOUNTING FOR PROCEEDS: CONVERSION. If a guardian fully accounts for the proceeds of an unauthorized sale of a note belonging to his ward's estate, the purchaser will not be liable to the ward as for conversion, although he bought with notice that the note was the ward's property; neither will the maker after payment to the purchaser be liable to pay again to the ward, although he also knew the facts when he paid. *Gum v. Swearingen*, 553.

CORPORATIONS.

1. RAILROAD CORPORATION: MANAGEMENT, NOT FRAUDULENT: DIRECTORS INTERESTED IN CORPORATE CONTRACTS. The North Missouri

Railroad Company being heavily indebted and unable to negotiate a sale of its bonds, or otherwise provide the means necessary for the completion of its road, an association was formed, the object of which, as expressed in its articles, was the purchase of the bonds, and ultimately, if found profitable to do so, the purchase of the road itself, provided the association could obtain the control of the company. The bonds were subsequently purchased of the company, and the association was allowed to name a majority of the directors. This transaction being assailed as fraudulent, because the control of the company was surrendered to the association, and because the association looked to the ultimate acquisition of the road; *Held*, that these facts did not establish fraud. The control of the directory was nothing more than a proper security for the due application of the money advanced on the bonds; and it would not be presumed that the contemplated purchase of the road was intended to be made in any other than a lawful manner and under circumstances which would authorize it.

It was further objected that the transaction was constructively fraudulent, because, at the time of its consummation three of the directors of the company were members of the association; *Held*, that if this were the fact, it would not make the sale void. *Kitchen v. The St. Louis, Kansas City & Northern Railway Company*, 224.

2. RAILROAD CORPORATION CONTRACT: CONSIDERATION. The proceeds of the bonds mentioned above proving inadequate to complete the road, another association, known as the St. Louis & North Missouri Association, contracted with the company to furnish the money necessary for its completion, and for the payment of certain mortgage obligations then about to become due, and also to purchase and hold the company harmless from a matured lien on the road then held by the State for $7,000,000. The cash outlay to be made under this contract amounted to about $2,000,000. In pursuance of the terms of the statute which authorized the sale of the State's lien, the association gave a bond in the sum of $500,000 conditioned for the early completion of the road. In return for these assumptions and liabilities, the company issued to the association $4,000,000 of second mortgage bonds, and $5,000,000 of stock; *Held*, that these were issued upon sufficient consideration. *Ib.*

CONTRACT WITH DIRECTORS AVOIDABLE. Shortly after the foregoing contract was proposed to the company, and before it was formally accepted, several of the directors of the company became members of the association; *Held*, that this fact rendered the contract, when made, voidable, but not absolutely void.

LACHES OF STOCKHOLDERS. And it appearing further that the existence of the contract and the issue of the second mortgage bonds had been reported to a meeting of the stockholders shortly after it was made, and that they made no objection and no offer of aid to the company, but permitted the association to proceed and expend its money in building the road; *Held*, that after the lapse of five years it was too late for stockholders to impeach the transaction. *Ib.*

3. INSOLVENT CORPORATION: CREDITORS MAY COMBINE FOR SELF-PROTECTION WITHOUT FRAUD. Default having occurred in the payment of interest on the second mortgage bonds above mentioned, a sale was made under the mortgage, at which the road was purchased, by an agent, for the Illinois, Missouri & Kansas Association, an asso-

ciation whose capital was subscribed in part by some of the directors and other stockholders of the company, who were also creditors, and by mortgage bondholders and other creditors, but largely, also, by outside parties. This association was formed for the express purpose of buying the road and re-organizing it under a new corporation; *Held*, that there was no fraud in this. The law does not prohibit the creditors of a corporation from combining for the purpose of protecting themselves by purchasing its property when legally brought to sale, provided it is no part of the agreement to prevent competition at the sale or to use any unfair advantage. *Ib.*

4. TRUSTEE SELLING TO HIMSELF. The trustees who made the sale were themselves members of the association which made the purchase, their interest amounting to one thirty-fourth part of the whole capital of the association; *Held*, that this fact did not render the sale void, but it gave the company the right to redeem, provided the right was exercised within a reasonable time and before the intervention of new equities. *Ib.*

5. ACQUIESCENSE OF CESTUI QUE TRUST. The second mortgage was executed in 1868, and was reported at the next meeting of the stockholders as a liability of the company. The sale took place in August, 1871. This suit was brought in July, 1873, and the amended petition on which the case was tried, was filed in December, 1874. The plaintiff was all the time a stockholder, was present at the sale, and though he believed the mortgage to be illegal and void, sought no information from the trustees, and made no effort to stop the sale. He subsequently agreed to convert all of his stock into stock of the corporation created by the members of the association for the purpose of owning and operating the road, and did actually so convert, and afterwards sold a part of it for cash. The proceeds of the second mortgage bonds were used in completing the road, and between the date of the sale and the bringing of this suit, other large sums of money had been expended by the new corporation in improving the road, and more than one-half of its stock had passed into the hands of innocent purchasers. Plaintiff bought the greater portion of his stock in the old company after the road was advertised for sale, at one-tenth to one-twentieth of its par value; *Held*, that these were such circumstances of delay, acquiescence and ratification as cut off the plaintiff's right to redeem. While a *cestui que trust* has a right to come into a court of equity and ask that a sale of trust property made by a trustee to himself be set aside, his coming must be timely; he has no right to lie idly by until new equities arise, and speculate on the success or non-success of the investment or transaction of which he complains, and see others, in good faith and without fraud, by a vast expenditure of money, make that valuable which was before valueless, and then come and ask the aid of the chancellor to enable him to appropriate to himself such benefits and advantages. *Ib.*

6. STOCKHOLDERS CHARGEABLE WITH KNOWLEDGE OF CORPORATE RECORDS. *Held*, also, that as the plaintiff was a stockholder in the company, and all the facts in relation to the execution of the mortgage, the circumstances under which it was made, and the sale of the bonds were shown by the records of the company, he was chargeable with knowledge of them, and must be held to have been cognizant of the frauds committed, if there were any, especially as he declined to make any inquiries of the trustees making the sale.

Ignorance, under such circumstances, may well be imputed to him as knowledge. *Ib.*

7. EQUITIES OF STOCKHOLDERS WHEN DIRECTORS BUY CORPORATE OBLIGATIONS AT A DISCOUNT. The second mortgage not covering certain portions of the property of the North Missouri Railroad Company, the Illinois, Missouri & Kansas Association, for the express purpose of acquiring those portions, bought up the greater part of the floating debt of the company at a discount, caused judgments to be obtained against the company on these claims at their face value, in the name of individual members of the association, had the road with all its property again sold under these judgments and became the purchaser as before. The directors of the North Missouri Railroad Company were at the time members of this association, but they were also creditors of the company to a very large amount, and were liable on its obligations as indorsers, and other members of the association were also creditors to a large amount; *Held*, that none of these circumstances rendered the sale *per se* fraudulent and void. The judgment for the face value of the claims may have been excessive and improper; but before there could be a divestiture of the title acquired under the sale, equity would, at the very least, require the plaintiffs to repay the amount actually expended in purchasing them. *Ib.*

8. STOCKHOLDER ESTOPPED BY CORPORATE ACT. A stockholder in a corporation will not be allowed to deny the validity of stock issued by the corporation in consideration of the acquisition of property, so long as the corporation retains the property. *Buford v. The Keokuk Northern Line Packet Company*, 611.

9. RAILROADS: DAMAGES: CHANGE OF ROUTE: WITHDRAWAL OF TRAINS: VIOLATION OF CHARTER A QUESTION FOR THE STATE ONLY. In an action by a private citizen to recover damages from a railroad company, sustained in the depreciation of his property by such company's discontinuance of its old route for the passage of its *through* trains, and its construction of a new route for that purpose, *Held*, not competent for the citizen to raise the question that such acts of the company were in violation of its charter; such question could only be raised in an action brought by the State. (Following *Martindale v. R. R. Co.*, 60 Mo. 510.)

Per HOUGH, J.—It was competent, in such action, to inquire into the right of the company to alter the number or character of the trains formerly run over the old route; but its right so to do was clear, if it continued to furnish the public with sufficient accommodation for freight and passengers. *Kinealy v. The St. Louis, Kansas City & Northern Railway Company*, 658.

COUNTY SUBSCRIPTION TO RAILROAD STOCK. See Wagner v. Meety, 150.

COSTS.

CRIMINAL. The expense of boarding a petit jury impaneled to try a murder case, cannot be taxed as costs against the county. *Bright v. Pike County*, 519.

CO-TENANTS.

DEDICATION OF JOINT PROPERTY, BY ONE. A dedication by one tenant in common of a part of the common property to public use, will not bind his co-tenants, so as to prevent them ffom inclosing and using the part so dedicated. *McBeth v. Trabue*, 642.

COUNTY.

SERVICE OF SUMMONS UPON. The mode of service of a summons upon a county is prescribed by Wag. Stat., § 6, p. 408, and is exclusive. No copy of the petition is required to be served with the writ, as in ordinary cases. *Weil v. Greene County*, 281.

THE CITY OF ST. LOUIS IS NOT A COUNTY. See the State ex rel. Burden v. Walsh, City Register, 408.

COUNTY BONDS.

1. COUNTY SUBSCRIPTION TO RAILROADS: INJUNCTION AGAINST, BY CITIZENS AND TAX-PAYERS. If a railroad company fails to comply with the conditions on which a county subscription has been made to its stock, injunction will lie to prevent it receiving bonds agreed to be issued in payment, and to compel the surrender and cancellation of any already issued; and this remedy may be invoked by any one who is a citizen and tax-payer of the county. *Wagner v. Meety*, 150.

2. CONSOLIDATION OF RAILROADS The privilege conferred upon a railroad company, by a charter granted in 1857, of having subscriptions made to it by county courts without the sanction of a popular vote, was not a vested right, and if the company became consolidated with another, this privilege did not pass to the consolidated company so as to authorize such a subscription to be made after the constitution of 1865 took effect without such sanction. *Ib.*

3. PLEADING: ACTION ON COUNTY BONDS: REQUISITES OF PETITION. In an action on bonds issued to pay a subscription by a county to a railroad company every essential element of the power given to the county to make such subscription, must be stated in the petition. *Weil v. Greene County*, 281.

4. MANDAMUS TO COMPEL COUNTY TREASURER TO PAY COUPONS: COUNTY WARRANT. The holder of county interest coupons is not obliged to obtain a warrant on the county treasury before demanding payment. It is the duty of the treasurer, if he has funds, to pay on presentation of the coupons at the treasury. If he refuses, he may be compelled by mandamus. The fact that the funds have been withdrawn by the county court since demand was made will be no defense to him; neither will the fact that the validity of the coupons is being contested by the county in another proceeding. *The State ex rel. Lane v. Craig*, 565.

THEIR LIABILITY TO TAXATION. The State ex rel. Dunnica v. The County Court of Howard County, 454.

SEE TAX, 13.

COUNTY COLLECTOR.

1. HIS SETTLEMENT: LIEN OF CLERK'S CERTIFICATE OF DELINQUENCY. An abstract of a settlement of a delinquent collector with the county court was filed with the clerk of the circuit court attested thus: "Witness my hand this 17th day of August, 1863. J. O. Jewett, county clerk Schuyler county, Missouri." The statute provided that when such a settlement was filed with the clerk of the circuit court, certified by the clerk of the county court under his hand *and seal of office*, it should operate a lien upon the real estate of the collector, and could be carried into effect in the same manner and with like effect as a judgment of the circuit court; *Held*, that the statute should be strictly construed, and as the certificate in question lacked the seal of the county court, it conferred no lien, and no execution could issue on it. *Sidwell v. Birney*, 144.

2. THE CITY OF ST. LOUIS NOT A COUNTY: COLLECTOR. The city of St. Louis, as constituted by the scheme of separation, is a city proper, and not a county; and the provisions of law which were in force before its adoption, requiring the election of a county collector and county marshal for the county of St. Louis, are not applicable to to the city. *The State ex rel. Burden v. Walsh*, 408.

COUNTY MARSHAL.

IN ST. LOUIS. See the State ex rel. Burden v. Walsh, 408.

COURTS.

1. CASS COUNTY COMMON PLEAS COURT: TRANSFER OF PROBATE CASES. It was error for the circuit court of Cass county to transfer to the common pleas court a case against an administrator pending in the circuit court on the 17th day of March, 1873, the date of the passage of the act amending the act establishing the common pleas court. There is no provision in that act requiring such transfer. *Ewing v. Brooks*, 49.

2. JURISDICTION OF BARTON COUNTY PROBATE COURT. The act of March 19th, 1866, establishing probate courts for Barton and other counties, (Sess. Acts 1865-6, p. 84,) conferred upon those courts exclusive original jurisdiction of all demands against the estates of deceased persons. The fact that a living person was jointly liable with the estate of a decedent would not authorize the circuit court to take jurisdiction. *Julian v. Ward*, 153

2. ATCHISON PROBATE COURT: CRIMINAL JURISDICTION. The probate court of Atchison county has power to admit to bail and take recognizance from persons charged with crime. *The State v. Millsaps*, 359.

4. CAPE GIRARDEAU COURT OF COMMON PLEAS: CHANGE OF VENUE. The Cape Girardeau court of common pleas has power to order a case pending before it to be sent to the circuit court of another county for trial upon proof of prejudice on the part of the inhabitants of Cape Girardeau county. *The State to use of the Board of Education v. Tiedemann*, 515.

CRIMINAL COURT OF THE SIXTH JUDICIAL CIRCUIT, &C. See the State v. Williams, 110.

CRIMINAL LAW.

1. CITY ORDINANCE AGAINST GAMING: REPEAL. A city having the power, under its charter, to pass ordinances, may likewise repeal them on such conditions as are reasonable and just. The repeal of an ordinance to suppress gaming, except as to offenses committed and forfeitures incurred previous thereto; *Held*, valid. *City of Kansas v. White*, 26.

2. ALIBI: REASONABLE DOUBT. When, upon the trial of an indictment for murder, the prisoner has given evidence to prove an *alibi*, it is error for the court to refuse an instruction to the effect that the jury must acquit if they have a reasonable doubt as to his absence at the time of the homicide. *The State v. Lewis*, 92.

3. PRESENCE OF THE PRISONER. The rule that the record must affirmatively show the presence of the prisoner during the progress of the trial and at the rendition of the verdict, is sufficiently complied with if it shows that he was present at the opening of court on the day when the verdict was rendered. His absence will not be presumed until adjournment. *Ib.*

4. ALIBI: EVIDENCE IN REBUTTAL. When evidence has been given on behalf of the prisoner to prove an *alibi*, the prosecution is entitled to offer rebutting evidence to prove his presence. *Ib.*

5. SELF DEFENSE. The plea of self defense is not available by one who, himself, brings on an affray, or who prepares himself for an encounter in which he intends to wreak his malice. *The State v. Maguire*, 197.

6. EVIDENCE OF DEFENDANT IN HIS OWN BEHALF. Where a prisoner testifies on a trial in his own behalf, the jury may be properly instructed to consider this fact in determining the credit to be given to his testimony. *Ib.*

7. FORFEITURE OF RECOGNIZANCE. The cognizor in a bond conditioned for his appearance at the next term of the circuit court to answer to an indictment then to be preferred, and not to depart from the court without leave, forfeits his bond if he fails to appear, or having appeared, departs without leave, whether an indictment is found against him or not. *The State v. Millsaps*, 359.

8. ARRAIGNMENT AND PLEA, WHEN NECESSARY, WHEN NOT. The rule that in order to sustain a conviction for a criminal offense, the record must show that the defendant was arraigned and that a plea was entered, has never been extended to cases other than proceedings by indictment. It does not apply to a prosecution for violation of a city ordinance prohibiting the keeping of a bawdy house. *The City of Lexington v. Curtin*, 626.

PROSECUTING OFFICER CANNOT ADOPT COMPLAINT NOT MADE BY HIMSELF. See City of Kansas v. Flanagan, 22.

CRIMINAL PROSECUTION TO ENFORCE PAYMENT OF LAWYERS' LICENSE TAX. See the City of St. Louis v. Sternberg, 289.

WHAT IS A DEADLY WEAPON, A QUESTION FOR THE JURY. See The State v. Harper, 425,

THE STATE'S RIGHT OF APPEAL IN CRIMINAL CASES. See the State v. Bollinger, 577.

DAMAGES.

1. INJUNCTION will issue to prevent the invasion of a right secured by statute without proof of damage. *St. Louis Railroad Company v. Northwestern St. Louis Railway Company*, 65.

2. EXEMPLARY DAMAGES cannot be recovered without proof of aggravating circumstances attending the injury. *Morgan v. Durfee*, 469.

3. EVIDENCE OF DEFENDANT'S WEALTH: EXEMPLARY DAMAGES. The pecuniary standing of the defendant is not a proper subject of inquiry as bearing upon the question of damages sustained by the plaintiff, unless the case is attended by such circumstances of aggravation as will authorize the giving of exemplary damages. And this is the rule in actions brought under Wagner's Statutes, section 4, page 520, as well as in ordinary cases. *Ib.*

4. MEASURE OF RECOVERY BY WIDOW FOR THE KILLING OF HER HUSBAND. When a laborer employed by a railroad company is killed in consequence of the use of defective apparatus, a cause of action accrues to his widow under section 3 of the damage act, (Wag. Stat., p. 520,) and not under section 2; and the measure of damages will not be the sum of $5,000, as provided in section 2, but a sum not exceeding that amount as provided in section 3. (*Elliott v. St. L. & I. M. R. R. Co.*, 67 Mo. 272.) *Holmes v. The Hannibal & St. Joseph Railroad Company* 53.

5. COMMON CARRIER: ACTION AGAINST, FOR DELAY IN TRANSPORTATION OF CATTLE: MEASURE OF DAMAGES. In an action against a common carrier for damages occasioned by delay in the transportation and delivery of cattle, the measure of damages is the difference between the market price of the cattle when they arrived at their destination and the market price when they should have arrived, together with compensation for the difference between the shrinkage in weight actually sustained by the cattle and that which would have occurred if there had been no delay. (*Sturgeon v. R. R. Co.*, 65 Mo. 570.) Evidence is not admissible to show that between the time of their arrival and the time when they were sold, a decline in the market took place. *Glascock v. The Chicago & Alton Railroad Company*, 589.

6. TO INDIVIDUAL, CAUSED BY DISCONTINUANCE OF RAILROAD TRAINS. A railroad company is not liable in damages to an individual for depreciation in the value of his property caused by the company's partial withdrawal of trains, unless the depreciation was special and peculiar to him, and not shared by the other members of the community. *Kinealy v. The St. Louis, Kansas City & Northern Railway Company*, 658.

DAMAGES FROM UNSAFE SIDEWALK. See Oliver v. The City of Kansas, 79.

OCCASIONED BY CONSTRUCTION OF RAILROAD IN A PUBLIC STREET. See Swenson v. The City of Lexington, 157.

IN EJECTMENT FOR STREET WRONGFULLY OPENED. See Armstrong v. The City of St. Louis, 309.

LIABILITY FOR DAMAGES OCCASIONED BY FALL OF A HOUSE DURING A WINDSTORM. See Flori v. The City of St. Louis, 341.

DEEDS.

1. A CERTIFICATE OF ACKNOWLEDGMENT of a deed ran thus: "State of Missouri, Schuyler county, ss.; Be it remembered that before the undersigned, circuit clerk, comes L. H. C.," &c.; *Held*, that it sufficiently appeared that the certificate was granted by the clerk of the circuit court of Schuyler county. *Sidwell v. Birney*, 144.

2. A CASE WHERE A DEED WAS PRESUMED. A deed from Juan Arenton to Jonathan Hillebran was the only link wanting to complete a chain of title from a concession by the Spanish Lieutenant-Governor, A. D. 1780, to the passage of the legal title from the United States in 1874. Hillebran was the brother-in-law of John Herrington, of whose name Arenton was probably a perversion, and procured a deed dated May 24th, 1800, from Robideaux, under which Arenton acquired title. At the execution of this deed Arenton was not present, although his presence was therein recited; and, contrary to the Spanish custom, his name was not signed thereto. Hillebran's name was signed to the deed, and he at once went into possession of the land thereunder. In 1808 he presented a claim to the land before the board of commissioners, in his own name as assignee of Robideaux; in 1811 he presented the claim in the name of John Herrington, as such assignee. In the first case the claim was confirmed to the legal representatives of Robideaux; and in the latter to the legal representatives of Dorian, the original grantee. Actual possession was the main basis for the grant and confirmation under the Spanish law and the law of the United States. Three days after the latter confirmation, Hillebran conveyed the land in his own name. From the year 1800 until his death in 1864, Herrington lived in the immediate vicinity of the land, except for a period of seven or eight years, and was never heard to make any claim to the land whatsoever. Hillebran, and those claiming under him, had been in possession for nearly seventy-five years; *Held*, that the deed to Arenton was a mistake, or else Arenton had conveyed to Hillebran and that, although the facts were singular and difficult to be explained, for the purpose and upon the principle of quieting the possession, the court sitting as a jury, was authorized to presume, and should have presumed, such a conveyance. *Brinley v. Forsythe*, 176.

3. CONVEYANCE TO MOTHER AND CHILDREN. A conveyance to a woman "and all her children she now has or ever will have," vests a life estate in the mother with remainder to the children. HENRY, J., dissenting. *Kinney v. Mathews*, 520.

EQUITABLE DOCTRINE AS TO EFFECTUATING CONVEYANCES IN CASE OF DEFECTIVE EXECUTION OF POWER. See Kinney v. Mathews, 520.

DEDICATION OF PUBLIC HIGHWAY. See McBeth v. Trabue, 642.

DEEDS OF TRUST AND MORTGAGES.

1. PREMATURE SALE UNDER. A sale made by a trustee in the execution of a deed of trust before the occurrence of the event, upon the happening of which he is authorized to sell, is void. *Eitelgeorge v. Mutual House Building Association*, 52.

2. TRUSTEE'S STATEMENTS, AS EVIDENCE AGAINST CESTUI QUE TRUST. Statements made by a trustee cannot be treated as admissions of the *cestui que trust*, and are not binding upon the latter unless made by his authority. *Ib.*

3. TRUSTEE MUST BE PRESENT THROUGHOUT THE SALE. When a sale is made under a deed of trust, it is the duty of the trustee to be present for the purpose of observing its progress, protecting the interests of the parties concerned, rejecting fraudulent bids, and if necessary, adjourning the sale; and he must be present during the whole sale. It is not sufficient that he is present at its opening and close, if he absents himself during its progress. *Brickenkamp v. Rees*, 426.

4. A MORTGAGE VOID IN PART ONLY. A mortgage covering the fixtures and furniture of a drug store and also the stock of drugs, will not be held void as to the fixtures and furniture, because as to the stock of drugs it is invalidated by the fact that the mortgageor, with the consent of the mortgagee, remained in possession and continued his usual business of selling the drugs. (Following *State to use, &c., v. Tasker*, 31 Mo. 445; *State to use, &c., v. D'Oench*, 31 Mo. 453.) *Donnell v. Byern*, 468.

AS AFFECTED BY PRIOR FRAUDULENT CONVEYANCE. See St. Louis Mutual Life Insurance Company v. Cravens, 72.

DISTRIBUTION OF PROCEEDS OF SALE UNDER. See Olmstead v. Tarsney, 396.

ASSUMPTION OF. See Heim v. Vogel, 529.

DEMURRER.

CANNOT RAISE THE QUESTION WHAT IS A DEADLY WEAPON. Whether a knife or a brickbat is a deadly weapon, is not a question of law to be determined on demurrer to an indictment, but a question of fact for the jury. *The State v. Harper*, 425.

SEE STATE V. MILLSAPS, 359.

DEPOSITIONS.

TAKEN IN ANOTHER SUIT. Where one of the parties to a suit was a party to a former suit, while the other claims title to the matter in controversy through the other party to the former suit, a deposition taken in the former suit upon sufficient notice, is admissible in evidence without being filed in the latter, and without other notice being given of its intended use, provided no surprise is worked. *Adams v. Raigner*, 363.

DEPUTY.

CITY ATTORNEY CANNOT ACT BY, WHEN. See City of Kansas v. Flanagan, 22.

DESTROYED RECORD.

SUPPLYING DESTROYED JUDGMENT. In a proceeding to supply a judgment, the record of which has been destroyed, the court should not render a new judgment, but should restore the old one, so as to make the record show when it was rendered, against whom and the amount. This is all that the statute relating to the supplying of lost and destroyed records was intended to accomplish. Gen. Stat. 1865, p. 182. *Julian v. Ward*, 153.

DOMICIL.

1. THE RIGHT TO DEFEND ONE'S PERSON AND PROPERTY. Every man has a right to defend his premises from intrusion as well as his person from attack, and for that purpose to employ such force as may reasonably appear to him to be necessary; and if in the use of such force fatal consequences unexpectedly ensue to the intruding or attacking party, he is not answerable for them. *Morgan v. Durfee*, 469.

2. ——— ONE'S PLACE OF BUSINESS. One's business office is *pro hac vice* his dwelling, and the owner has the same right to use force in defending it against intrusion as he has in defending his dwelling. *Ib.*

SEE THE STATE EX REL. DUNNICA V. THE COUNTY COURT OF HOWARD COUNTY, 454.

DUE PROCESS OF LAW.

IN ASSESSMENT OF TAXES. See the State ex rel. Ferguson v. Moss, 495.

ECCLESIASTICAL LAW.

DEVISE TO OLD SCHOOL BAPTIST CHURCH VOID UNDER CONSTITUTION OF 1865. See Boyce v. Christian, 492.

EJECTMENT.

1. ACTION TO RECOVER FOR IMPROVEMENTS BY DEFEATED DEFENDANT IN. An action under Wag. Stat., section 20, page 561, by a defendant in an ejectment suit against whom a judgment for possession has been rendered, to recover compensation for improvements made in good faith on the land prior to the action of ejectment, must be brought in the court in which such judgment was rendered, and before eviction from the premises. *Malone v. Stretch*, 25.

2. FORM OF JUDGMENT IN SUCH ACTION. The statute does not authorize an absolute judgment for a pecuniary recovery in favor of the occupying claimant. *Ib.*

3. TO RECOVER A STREET-WAY. The owner of land wrongfully taken by

a city and converted into and used as a public street, may maintain ejectment against the city for its recovery. *Armstrong v. The City of St. Louis*, 309.

4. DAMAGES IN EJECTMENT: BENEFITS FROM STREET OPENING. In ejectment to recover land wrongfully appropriated by a city for a street, the jury have no right to consider the benefits accrued to the plaintiff by reason of the making of the street, in reduction of damages. *Ib.*

DELINQUENT VENDEE SUED IN EJECTMENT MAY RETAIN POSSESSION ON PAYMENT OF PURCHASE MONEY, WHEN. See Fulkerson v. Brownlee, 371.

ELECTION.

ON COUNTY SUBSCRIPTION TO RAILROAD STOCK. See Wagner v. Meety, 150.

EMINENT DOMAIN.

1. SURRENDER OF LAND BY OWNER WITHOUT PRE-PAYMENT OF DAMAGES. The court affirms the rule laid down in this case when it was here before (57 Mo. 256), as to acquiescence of the land owner in the construction of a railroad over his land pending proceedings for condemnation. *Provolt v. The Chicago, Rock Island & Pacific Railroad Company*, 633.

2. EXECUTION TO ENFORCE PAYMENT OF DAMAGES. Section 31, page 327, Wagner's Statutes, requiring motion and notice before an execution can be issued against a railroad company to compel payment of damages assessed for the taking of land for right of way, does not apply to the Chicago & Southwestern Railroad Company. Under the charter of that company a general judgment may be rendered against the company, for the enforcement of which execution may issue, of course, as in other cases. (Acts 1860, p. 441, § 4; Acts 1853, p. 357, §§ 8, 9.) *Ib.*

3. JUDGMENT ON A SECOND ASSESSMENT OF DAMAGES. Where a second assessment of damages is made in a proceeding to condemn land for railway purposes, the court must render judgment for the full amount found by the commissioners. If money has been paid into court upon a former assessment, which has since been set aside at the instance of the land owner, it cannot be treated as a payment or allowed as a credit on the judgment. *Ib.*

4. EQUITABLE LIEN FOR PRICE OF LAND TAKEN AND NOT PAID FOR. The owner of land condemned for railway purposes and not paid for, retains a lien for the price, even after the road has gone into operation, and a court of equity will enforce the lien against the company taking the land and all others occupying it as lessees or otherwise. *Ib.*

5. INJUNCTION TO COMPEL PAYMENT OF DAMAGES. When a railroad company, for whose use land has been condemned and taken, has become insolvent, and the owner has appealed in vain to all the statutory remedies for collection of his damages, a court of equity will afford relief by ordering payment, and, in default of payment, will restrain the original company or any company holding under

it from operating the road on his land. The time within which payment should be made in order to avoid the consequences of default, should be prescribed in the final decree. It is not sufficient that it be prescribed in an interlocutory decree. *Ib.*

EQUITY.

1. RELIEF AGAINST MIXED AND MUTUAL MISTAKE OF LAW AND FACT. An administrator sold lands of his intestate, supposing and representing that it was the fee that he was selling. The purchaser supposed it was the fee that he was buying. It turned out that nothing passed by the sale but the equity of redemption. *Held*, that this was such a case of mixed and mutual mistake of law and fact as entitled the purchaser to relief in equity. *Griffith v. Townley*, 13.

2. ADMINISTRATOR'S SALE: REPORT OF SALE: INSUFFICIENT DEED: PURCHASER'S EQUITY FOR A DEED. In an action of ejectment it appeared by the records of the probate court that a sale of several parcels of land had been made by an administrator in obedience to an order of the court, and had been approved by the court. It appeared, also, that the purchase money had been paid in full, and the purchaser had been put in possession of the tract in controversy by the administrator, but the deed, which he received, did not in terms describe the land. It did, however, use the description employed in the report of sale, which, after enumerating several tracts by their numbers, stated that they contained in the aggregate 353 74-100 acres. It was shown by parol evidence that all the lands of the decedent amounted to exactly 353 74-100 acres, including the tract in controversy, and that they constituted a farm, the dwelling house and orchard of which were on this tract. Defendants claiming under this sale; *Held*, that, as *bona fide* purchasers, they had rights which a court of equity would enforce; that, although for want of explicitness in the description, the administrator's deed might not convey the legal title, yet the same degree of particularity is not required in a report of sale as in a deed, and since it sufficiently appeared that the tract in controversy was in point of fact sold and paid for, as against the plaintiffs, who were heirs of the decedent, defendants were entitled to the land; and accordingly there was a decree vesting the title in them. *Gilbert v. Cooksey*, 42.

3. RELIEF AGAINST FRAUDULENT PARTITION SALE: PARENT AND CHILD. The defendant, being the step-father of the plaintiffs, after their mother's death, by a course of bad treatment, drove all but one of them from the home which had been left them by their father, and continued himself to occupy the property, as he had done for years previously. The plaintiffs were all minors at the time. Shortly afterwards he caused himself to be appointed guardian of the one who remained with him, and as guardian, immediately instituted proceedings for the partition of the property. The writ was served upon the present plaintiffs, but being unable to read, they did not understand what it meant. The proceedings resulted in a decree for partition, and, at the instance of the present defendant, a sale was ordered. The sale was advertised according to law, and defendant became the purchaser at the price of $100. The land was, at the time, worth $700 or $1,000. Defendant paid the purchase money, but it was subsequently refunded to him by the sheriff, none of the plaintiffs receiving any share of it. Defendant did not inform any of the plaintiffs that the partition proceedings

were pending, or that a sale was to take place, although he often saw them, nor did any of them, except, perhaps, the eldest, know of the fact; neither did he mention the matter to any of his neighbors. Plaintiffs having sued to have the sale and the sheriff's deed executed in pursuance of it set aside as fraudulent; *Held*, that they were entitled to such relief, and a decree in their favor was affirmed. *Henrioid v. Neusbaumer*, 96.

4. ——: FRAUDULENT IN PART, FRAUDULENT IN TOTO. Under the circumstances detailed above, the fact that at the time of the sale one of the present plaintiffs was of age, and perhaps knew that it was to take place, and that the present defendant was not the guardian of any but the youngest, and, therefore, was not by law disabled to buy the interests of the others, was held no obstacle to a decree setting aside the entire sale. A court of equity will not go into vulgar fractions to ascertain what proportion of such a transaction may be upheld. *Ib.*

5. ——: NO LACHES. Plaintiffs did not bring their suit until eight years after the sale. In the meantime defendant had put improvements on the land to the value of $500. Plaintiffs all lived in the same county during the whole time; but it was not shown that they discovered the fraud which had been practiced on them before the improvements were made; *Held*, that no such laches was proven as ought to preclude the plaintiffs from equitable relief. *Ib.*

6. EQUITABLE INTERFERENCE AS BETWEEN PARTIES NOT IN PARI DELICTO. Where one who reposes confidence in another, has been induced by the fraudulent misrepresentations of the latter to attempt the perpetration of a fraud, the two are not *in pari delicto*, and as between them the rule in favor of the possessor cannot be invoked to prevent equity from interfering on behalf of the former. *Poston v. Balch*, 115.

7. CASE ADJUDGED. The plaintiff and his wife, having determined to separate, agreed upon a division of property, and she accepted a portion in lieu of alimony and other claims against his estate. Previous to this, she had instructed her attorney to institute a suit on her behalf for a divorce. The attorney not being apprised of the financial settlement, inserted in the petition a claim for alimony. The husband not knowing that this was done by mistake, became greatly alarmed. While in this state of mind, he visited the present defendant, who was an old acquaintance and apparently warm friend. During the visit he disclosed his troubles with his wife, and requested the defendant's intercession to induce her to withdraw her claim. The defendant undertook the mission, but instead of carrying it out in good faith, urged her to insist upon her claim. She, however, declined, and declared her purpose of standing by the arrangement already made. The defendant, nevertheless, reported to the plaintiff that she would insist on the claim as made in the petition, and suggested to him, as a means of defeating her, that he should put his property into the hands of a friend. Acting on this suggestion, plaintiff did, for a nominal, or, at least, an inadequate consideration, transfer all of his property to defendant. Having subsequently discovered the fraud practiced upon him, plaintiff brought this suit to set aside the transfer, and to subject certain real estate, for which defendant had exchanged the property, to a lien for its value. *Held*, that the parties were not *in pari delicto*, and equity would afford the relief sought. *Ib.*

8. RAILROAD CORPORATION: MANAGEMENT, NOT FRAUDULENT: DIRECTORS INTERESTED IN CORPORATE CONTRACTS. The North Missouri Railroad Company being heavily indebted and unable to negotiate a sale of its bonds, or otherwise provide the means necessary for the completion of its road, an association was formed, the object of which, as expressed in its articles, was the purchase of the bonds, and ultimately, if found profitable to do so, the purchase of the road itself, provided the association could obtain the control of the company. The bonds were subsequently purchased of the company, and the association was allowed to name a majority of the directors. This transaction being assailed as fraudulent, because the control of the company was surrendered to the association, and because the association looked to the ultimate acquisition of the road; *Held*, that these facts did not establish fraud. The control of the directory was nothing more than a proper security for the due application of the money advanced on the bonds; and it would not be presumed that the contemplated purchase of the road was intended to be made in any other than a lawful manner and under circumstances which would authorize it.

It was further objected that the transaction was constructively fraudulent, because, at the time of its consummation three of the directors of the company were members of the association; *Held*, that if this were the fact, it would not make the sale void. *Kitchen v. The St. Louis, Kansas City & Northern Railway Company*, 224.

9. RAILROAD CORPORATION CONTRACT: CONSIDERATION. The proceeds of the bonds mentioned above proving inadequate to complete the road, another association, known as the St. Louis & North Missouri Association, contracted with the company to furnish the money necessary for its completion, and for the payment of certain mortgage obligations then about to become due, and also to purchase and hold the company harmless from a matured lien on the road then held by the State for $7,000,000. The cash outlay to be made under this contract amounted to about $2,000,000. In pursuance of the terms of the statute which authorized the sale of the State's lien, the association gave a bond in the sum of $500,000 conditioned for the early completion of the road. In return for these assumptions and liabilities, the company issued to the association $4,000,000 of second mortgage bonds, and $5,000,000 of stock; *Held*, that these were issued upon sufficient consideration. *Ib.*

CONTRACT WITH DIRECTORS VOIDABLE. Shortly after the foregoing contract was proposed to the company, and before it was formally accepted, several of the directors of the company became members of the association; *Held*, that this fact rendered the contract, when made, voidable, but not absolutely void.

LACHES OF STOCKHOLDERS. And it appearing further that the existence of the contract and the issue of the second mortgage bonds had been reported to a meeting of the stockholders shortly after it was made, and that they made no objection and no offer of aid to the company, but permitted the association to proceed and expend its money in building the road; *Held*, that after the lapse of five years it was too late for stockholders to impeach the transaction. *Ib.*

10. INSOLVENT CORPORATION: CREDITORS MAY COMBINE FOR SELF-PROTECTION WITHOUT FRAUD. Default having occurred in the payment of interest on the second mortgage bonds above mentioned, a sale

was made under the mortgage, at which the road was purchased, by an agent, for the Illinois, Missouri & Kansas Association, an association whose capital was subscribed in part by some of the directors and other stockholders of the company, who were also creditors, and by mortgage bondholders and other creditors, but largely, also, by outside parties. This association was formed for the express purpose of buying the road and re-organizing it under a new corporation; *Held*, that there was no fraud in this. The law does not prohibit the creditors of a corporation from combining for the purpose of protecting themselves by purchasing its property when legally brought to sale, provided it is no part of the agreement to prevent competition at the sale or to use any unfair advantage. *Ib.*

11. TRUSTEE SELLING TO HIMSELF. The trustees who made the sale were themselves members of the association which made the purchase, their interest amounting to one thirty-fourth part of the whole capital of the association; *Held*, that this fact did not render the sale void, but it gave the company the right to redeem, provided the right was exercised within a reasonable time and before the intervention of new equities. *Ib.*

12. ACQUIESCENSE OF CESTUI QUE TRUST. The second mortgage was executed in 1868, and was reported at the next meeting of the stockholders as a liability of the company. The sale took place in August, 1871. This suit was brought in July, 1873, and the amended petition on which the case was tried, was filed in December, 1874. The plaintiff was all the time a stockholder, was present at the sale, and though he believed the mortgage to be illegal and void, sought no information from the trustees, and made no effort to stop the sale. He subsequently agreed to convert all of his stock into stock of the corporation created by the members of the association for the purpose of owning and operating the road, and did actually so convert, and afterwards sold a part of it for cash. The proceeds of the second mortgage bonds were used in completing the road, and between the date of the sale and the bringing of this suit, other large sums of money had been expended by the new corporation in improving the road, and more than one-half of its stock had passed into the hands of innocent purchasers. Plaintiff bought the greater portion of his stock in the old company after the road was advertised for sale, at one-tenth to one-twentieth of its par value; *Held*, that these were such circumstances of delay, acquiescence and ratification as cut off the plaintiff's right to redeem. While a *cestui que trust* has a right to come into a court of equity and ask that a sale of trust property made by a trustee to himself be set aside, his coming must be timely; he has no right to lie idly by until new equities arise, and speculate on the success or non-success of the investment or transaction of which he complains, and see others, in good faith and without fraud, by a vast expenditure of money, make that valuable which was before valueless, and then come and ask the aid of the chancellor to enable him to appropriate to himself such benefits and advantages. *Ib.*

13. STOCKHOLDERS CHARGEABLE WITH KNOWLEDGE OF CORPORATE RECORDS. *Held*, also, that as the plaintiff was a stockholder in the company, and all the facts in relation to the execution of the mortgage, the circumstances under which it was made, and the sale of the bonds were shown by the records of the company, he was chargeable with knowledge of them, and must be held to have been cognizant of the frauds committed, if there were any, especially as

he declined to make any inquiries of the trustees making the sale. Ignorance, under such circumstances, may well be imputed to him as knowledge. *Ib.*

14. EQUITIES OF STOCKHOLDERS WHEN DIRECTORS BUY CORPORATE OBLIGATIONS AT A DISCOUNT. The second mortgage not covering certain portions of the property of the North Missouri Railroad Company, the Illinois, Missouri & Kansas Association, for the express purpose of acquiring those portions, bought up the greater part of the floating debt of the company at a discount, caused judgments to be obtained against the company on these claims at their face value, in the name of individual members of the association, had the road with all its property again sold under these judgments and became the purchaser as before. The directors of the North Missouri Railroad Company were at the time members of this association, but they were also creditors of the company to a very large amount, and were liable on its obligations as indorsers, and other members of the association were also creditors to a large amount; *Held*, that none of these circumstances rendered the sale *per se* fraudulent and void. The judgment for the face value of the claims may have been excessive and improper; but before there could be a divestiture of the title acquired under the sale, equity would, at the very least, require the plaintiffs to repay the amount actually expended in purchasing them. *Ib.*

15. ADVERSE POSSESSION: PRINCIPAL AND SURETY. A sold a tract of land to B, from whom it passed by mesne conveyances to the defendant, who took possession. The sale to B was on credit, B giving his bond for the purchase money with plaintiff as surety. Plaintiff being compelled to pay the bond, took a conveyance of the land from A, and brought this suit to recover possession. Defendant relied on the statute of limitations, *Held*, that the possession of B, and of the defendant under him, was subordinate to the rights of A, and in the absence of evidence to show that it ever assumed a hostile character, the statute never commenced to run. Plaintiff was, therefore, entitled to recover; but upon refunding to the plaintiff the amount of the purchase money, defendant could retain the land. *Fulkerson v. Brownlee*, 371.

16. EQUITY PLEADING: FRAUDULENT CONVEYANCE. When the plaintiff bases his claim to equitable relief against several defendants on one general right, the petition is not demurrable for multifariousness, although the defendants may have separate and distinct defenses.

This principle applied to a case where plaintiff sought to have certain conveyances set aside as being in fraud of creditors. *Donovan v. Dunning*, 436.

17. REFORMATION OF DEEDS FOR MISTAKE ON THEIR FACE. The court can reform a deed where there are mistakes apparent upon the face of the instrument, without parol testimony to prove the mistake, as for instance, where the seal is omitted, though the deed purports to be under seal, or where there is no granting clause, although there are words of warranty. *Michel v. Tinsley*, 442.

18. EMINENT DOMAIN: EQUITABLE LIEN FOR PRICE OF LAND TAKEN AND NOT PAID FOR. The owner of land condemned for railway purposes and not paid for, retains a lien for the price, even after the road has gone into operation, and a court of equity will enforce the lien against the company taking the land and all others occupying it as

lessees or otherwise. *Provolt v. The Chicago, Rock Island & Pacific Railroad Company*, 633.

TO ENFORCE RIGHT OF REDEMPTION. See Olmstead v. Tarsney, 396.

EQUITABLE DOCTRINE AS TO EFFECTUATING CONVEYANCES IN CASE OF DEFECTIVE EXECUTION OF POWER. See Kinney v. Mathews, 520.

IN CASE OF FRAUDULENT VERBAL PROMISE CONCERNING LAND. See Wooldridge v. Scott, 669.

ESTATES.

1. DEFECTIVE EXECUTION OF POWER OF SALE: EQUITABLE DOCTRINE AS TO EFFECTUATING CONVEYANCES. When a person acts for a valuable consideration, he is understood in equity to engage with the person with whom he is dealing to make the instrument as effectual as he has power to make it. Upon this principle, in a case where a person having a life estate in lands and also a restricted power of sale over the fee, for the purpose of securing a loan of money executed a mortgage purporting to convey the fee, and referring in express terms to the power, but for want of compliance with the restrictions, the mortgage was not a good execution of the power; *Held*, that it was effectual to convey the life estate. *Kinney v. Mathews*, 520.

2. CONVEYANCE TO MOTHER AND CHILDREN. A conveyance to a woman "and all her children she now has or ever will have," vests a life estate in the mother with remainder to the children. HENRY, J., dissenting. *Ib.*

ESTOPPEL.

1. THERE is no estoppel unless the party to be estopped has made some statement, or has done some act upon which the other party has been induced to rely, and in consequence of which he has taken some action. *Eitelgeorge v. Mutual House Building Association*, 52.

2. BY RECEIVING A SUBSTITUTED ARTICLE. Where ninety-eight barrels of zinc were levied upon by the sheriff under an execution, and the claimant of the property was allowed to retain it upon giving a delivery bond to the sheriff; and the same number of barrels of zinc were delivered upon demand to the sheriff, and accepted by him as and for the zinc levied on, and sold by him under the direction of the plaintiff in the execution, and the proceeds applied in satisfaction thereof; *Held*, that the plaintiff in the execution was estopped from asserting that the zinc so received was different zinc from that which was seized under the levy. *Anthony to use of Deggendorf v. Bartholow*, 186.

3. EXECUTION: NOTICE OF CLAIM: ESTOPPEL. Where the owner of property, levied upon by the sheriff under an execution against a third party, asserts his claim before the sheriff, who notifies the plaintiff in the execution of such claim, who in consequence thereof executes an indemnifying bond, in which he admits knowledge of the claim, the owner is not required, as against the sheriff, or the plaintiff in the execution, to assert his claim, again, by forbidding the sale. *Ib.*

4. ESTOPPEL AGAINST DISPUTING ILLEGAL TAXATION. Payment of town taxes for a period of five years by the owners of land not legally liable to such taxation, submission for a like period to the exercise of jurisdiction by the town authorities in other matters, and participation in an election at which a subscription to a railroad company was voted by the town, in payment of which bonds were subsequently issued, are not sufficient by themselves to estop such person from disputing the legality of such taxation. *The Town of Cameron v. Stephenson*, 372.

5. STOCKHOLDERS ESTOPPED BY CORPORATE ACT. A stockholder in a corporation will not be allowed to deny the validity of stock issued by the corporation in consideration of the acquisition of property so long as the corporation retains the property. *Buford v. The Keokuk Northern Line Packet Company*, 611.

6. NO ESTOPPEL AS AGAINST MARRIED WOMEN AND INFANTS. Married women and infants will not be concluded from denying that a road laid out across their land is a public highway by reason of having traveled constantly over it and having admitted it to be public. *McBeth v. Trabue*, 642.

EVIDENCE.

1. TRUSTEE'S STATEMENT, AS EVIDENCE AGAINST CESTUI QUE TRUST. Statements made by a trustee cannot be treated as admissions of the *cestui que trust*, and are not binding upon the latter unless made by his authority. *Eitelgeorge v. The Mutual House Building Association*, 52.

2. JUDGMENT AS EVIDENCE IN FAVOR OF STRANGER. A judgment by default may be regarded as a solemn admission or judicial declaration of the fact by the parties, and as such is receivable in evidence against them and in favor of a stranger. *The St. Louis Mutual Life Insurance Company v. Cravens*, 72.

3. PRACTICE, CRIMINAL: ALIBI: EVIDENCE IN REBUTTAL. When evidence has been given on behalf of the prisoner to prove an *alibi*, the prosecution is entitled to offer rebutting evidence to prove his presence. *The State v. Lewis*, 92.

4. REPUTATION FOR INSOLVENCY MAY BE SHOWN, WHEN. In support of a charge that defendant knew that certain notes were worthless when he induced plaintiff to accept them in payment for property, it is competent to show that the maker of the notes was, at the time, reputed, in the community where he and the defendant lived, to be wholly insolvent. *Conover v. Berdine*, 125.

5. TESTIMONY OF ACCUSED IN CRIMINAL CASES. Where a prisoner testifies on a trial in his own behalf, the jury may be properly instructed to consider this fact in determining the credit to be given to his testimony. *The State v. Maguire*, 197.

6. THE VALUE OF PROFESSIONAL SERVICES may be shown by the testimony of a witness speaking from his own knowledge. He will not be confined to giving his opinion upon a hypothetical case, or upon facts detailed to the jury. *Brown v. Huffard*, 305.

7. HARMLESS ERROR IN RULING ON EVIDENCE. The trial court erroneously excluded evidence of declarations made by one of the defendants to plaintiff, but permitted the defendant, himself, to testify to the facts of which he had spoken to plaintiff, and his testimony was to the same effect as that offered by plaintiff. *Held*, that the error was harmless, and afforded no ground for reversing the judgment. *Carson v. Cummings*, 325.

8. DEPOSITIONS. Where one of the parties to a suit was a party to a former suit, while the other claims title to the matter in controversy through the other party to the former suit, a deposition taken in the former suit upon sufficient notice, is admissible in evidence without being filed in the latter, and without other notice being given of its intended use, providing no surprise is worked. *Adams v. Raigner*, 363.

9. NEWLY DISCOVERED: NEW TRIAL. If a party is aware that two or more persons know facts important to be proved by him, and goes to trial without calling them as witnesses, and afterwards discovers another person who could have testified to the same facts, he cannot have a new trial on the ground of newly discovered evidence. *Hanley v. The Life Association of America*, 380.

10. FAILURE OF EVIDENCE: PRACTICE IN SUPREME COURT. When there is no evidence to support the judgment, the Supreme Court will order a reversal, regardless of the declarations of law given. *Moore v. Hutchinson*, 429.

11. ADMISSIONS OF THE ACCUSED. Voluntary statements made by the accused while under arrest, if not drawn out by threats, promises or other improper means, are admissible in evidence against him. *The State v. Guy*, 430.

12. EVIDENCE OF THREATS. Upon a trial for murder a witness was permitted to testify that shortly before the killing took place, she heard the defendant say: "I'll kill him before day, God d—n him." *Held*, that the evidence was properly admitted, though the name of the deceased was not mentioned by defendant. Whether the threat referred to him or not, was for the jury to determine. *Ib.*

13. SELF DEFENSE: QUANTUM OF EVIDENCE TO SECURE ACQUITTAL. To entitle a defendant charged with murder to acquittal on the ground of self defense, he need not establish his defense by a preponderance of evidence. It will be sufficient if the evidence is such as to create, in the minds of the jury, a reasonable doubt of his guilt. (Following *State v. Alexander*, 67 Mo. 158.) *The State v. Hill*, 451.

14. PROMISSORY NOTE: PROOF OF EXECUTION: ADMISSIONS. The execution of a note not in the handwriting of the party sought to be charged may be shown to have been authorized by him, by proof of his own admissions. But the proof should be such as to identify the note, as by its date, amount, name of payee and consideration; otherwise it should not be received. *Smith v. Witton*, 458.

15. EVIDENCE OF DEFENDANT'S WEALTH: EXEMPLARY DAMAGES. The pecuniary standing of the defendant is not a proper subject of inquiry as bearing upon the question of damages sustained by the plaintiff, unless the case is attended by such circumstances of aggravation as will authorize the giving of exemplary damages. And this is the

rule in actions brought under Wagner's Statutes, section 4, page 520, as well as in ordinary cases. *Morgan v. Durfee*, 467.

16. PAROL EVIDENCE will not be received for the purpose of engrafting additional stipulations upon a written contract which is complete in itself. *Pearson v. Carson*, 550.

17. PROOF OF AGENCY. It does not require direct evidence to establish an agency. It may be inferred from circumstances. *Hull v. Jones*, 587.

18. PRACTICE: INSTRUCTIONS. Error committed in admitting evidence to the jury is not cured by the giving of instructions correctly declaring the law, unless the objectionable evidence is expressly withdrawn from their consideration. *Glascock v. The Chicago & Alton Railroad Company*, 589.

19. EVIDENCE: FOREIGN PROBATE OF WILL, A JUDICIAL PROCEEDING: STATUTE CONSTRUED. The probate of a will in another State is a judicial proceeding, to the record of which full faith and credit is to be given when certified in conformity to the act of Congress of 1790.

It is not necessary to the admission of such will and the probate thereof in evidence, that they shall have first been recorded in this State, as permitted by section 34 of the statute of wills, (Wag. Stat., p. 1369). *Lewis v. The City of St. Louis*, 595.

20. COPY OF PATENT. An exemplification of a patent from the United States certified by the Commissioner of the General Land Office, is receivable in evidence without proof of the loss of the original. (*Barton v. Murrain*, 27 Mo. 235.) *Avery v. Adams*, 603.

21. EVIDENCE OF CUSTOM: POSSESSION OF A PATENT. It appeared in an action of ejectment that a patent issued to A had been from an early day in the possession of W. By way of explaining this fact and in support of a title claimed under W, evidence was offered by the defendant to show that it was the custom, in early times in this State, to assign duplicate certificates of land entries by writing on the back of the certificate, and that such assignments were usually recognized as sufficient conveyances. *Held*, that this evidence, if admitted, would not have been of itself proof that such an assignment had been made of the certificate of entry on which the patent in question was issued, and without some proof of such assignment the fact that W had possession of the patent could avail the defendant nothing. *Ib.*

OF NECESSITY FOR PUBLIC IMPROVEMENTS. See Oliver v. The City of Kansas, 79.

PRESUMPTION AS TO DATES. See Smith v. Ferry, 142.

SHERIFF'S RETURN, WHEN CONCLUSIVE. Anthony to use of Deggendorf v. Bartholow, 186.

RES ADJUDICATA. See Armstrong v. The City of St. Louis, 309.

OF RENTAL VALUE. See Ib.

HARMLESS ERROR IN RULING ON. See Carson v. Cummings, 325.

IN AN ACTION FOR DAMAGES. See Haley v. The St. Louis, Kansas City & Northern Railway Company, 614.

EXECUTION.

1. SHERIFF'S RETURN, WHEN CONCLUSIVE. In a suit upon a bond given by the plaintiff in an execution to the sheriff to indemnify him for the seizure and sale under the execution of property claimed by a third party, the sheriff's return is conclusive upon the plaintiff in the execution, as to the fact of a levy upon the property, in favor of the claimant. *Burgert v. Borchert*, 59 Mo. 80, distinguished. *Anthony to use of Deggendorf v. Bartholow*, 186.

2. ESTOPPEL. Where ninety-eight barrels of zinc were levied upon by the sheriff under an execution, and the claimant of the property was allowed to retain it upon giving a delivery bond to the sheriff; and the same number of barrels of zinc were delivered upon demand to the sheriff, and accepted by him as and for the zinc levied on, and sold by him under the direction of the plaintiff in the execution, and the proceeds applied in satisfaction thereof; *Held*, that the plaintiff in the execution was estopped from asserting that the zinc so received was different zinc from that which was seized under the levy. *Ib.*

3. NOTICE OF CLAIM: ESTOPPEL. Where the owner of property, levied upon by the sheriff under an execution against a third party, asserts his claim before the sheriff, who notifies the plaintiff in the execution of such claim, who in consequence thereof executes an indemnifying bond, in which he admits knowledge of the claim, the owner is not required, as against the sheriff, or the plaintiff in the execution, to assert his claim, again, by forbidding the sale. *Ib.*

4. PUBLIC SCHOOL PROPERTY EXEMPT FROM EXECUTION. It would be against the policy of our laws to permit the property of a board of education, held for public school purposes, to be taken in execution at the suit of a creditor. *The State to use of the Board of Education v. Tiedemann*, 306.

5. INJUNCTION AGAINST EXECUTION. Equity will interpose by injunction to prevent a sale of such property under execution. *Ib.*

6. SALE BY SMALLEST LEGAL SUBDIVISIONS: EJECTMENT. The fact that at a sale under execution in a tax case the sheriff failed to sell the land by its smallest legal subdivisions, is no defense to an action of ejectment brought by the purchaser to recover possession. *Wellshear v. Kelley*, 343.

7. ST. LOUIS EXECUTION LAW: INDEMNIFYING BOND: RELEASE OF SHERIFFS, &C., FROM LIABILITY FOR FALSE LEVY: CONSTITUTIONAL LAW: REPLEVIN. The act of March 3rd, 1855, in relation to the sheriff, marshal and constables, of the county of St. Louis, (Acts 1855, p. 464,) provides that where any such officer shall levy any attachment or execution upon personal property, and any person other than the defendant in the suit shall claim the property and notify the officer in writing of his claim, the officer may take from the plaintiff in the writ a sufficient bond of indemnity for the benefit of the claimant, and may refuse

to execute the writ until such bond is given; and if he does take such bond, then he shall not be liable to such claimant for any damages resulting from the levy. *Held*, that any claimant who gives the notice provided for by the act tacitly agrees that if the officer will take the bond, he will release him from personal liability, provided the bond be a good and sufficient one, and cannot, therefore, complain of the act as being unconstitutional in depriving him of a right of action against the officer. *Held*, also, that the act is not repealed by Wag. Stat., § 6, p. 897.

The fact that a bond has been taken as provided by the act upon notice of claim, is a bar to an action of replevin by the claimant against the sheriff for the property. *Dodd v. Thomas*, 364.

8. PRACTICE: NOTICE. A motion to set aside a judgment after third persons have acquired an interest in property sold under the execution, is properly denied, if such persons are not made parties or notified of the motion. *Molloy v. Batchelder*, 503.

9. EXECUTION SALE PENDING BANKRUPTCY PROCEEDINGS. A sale of the property of a bankrupt under execution upon a judgment rendered and levy made prior to the adjudication of bankruptcy, is valid. *Fisher v. Lewis*, 629.

10. TO ENFORCE PAYMENT OF DAMAGES. Section 31, page 327, Wagner's Statutes, requiring motion and notice before an execution can be issued against a railroad company to compel payment of damages assessed for the taking of land for right of way, does not apply to the Chicago & Southwestern Railroad Company. Under the charter of that company a general judgment may be rendered against the company, for the enforcement of which execution may issue, of course, as in other cases. (Acts 1860, p. 441, § 4; Acts 1853, p. 357, §§ 8, 9.) *Provolt v. The Chicago, Rock Island & Pacific Railroad Company*, 633.

IN ATTACHMENT CASES. See Philips v. Stewart, 149.

EXEMPTION, A PERSONAL RIGHT. See Abernathy v. Whitehead, 28.

EXEMPTION.

MARRIED WOMAN'S: WHO CAN CLAIM. The exemption under Wagner's Statute, section 24, page 935, of the rents, issues and products of the real estate of a married woman is a personal right and must be claimed by herself. If waived by her it cannot be set up by a creditor. *Abernathy v. Whitehead*, 28.

OF PUBLIC SCHOOL PROPERTY FROM EXECUTION. See the State to use of the Board of Education v. Tiedemann, 306.

FORCIBLE AND UNLAWFUL ENTRY AND DETAINER.

UNLAWFUL DETAINER: LANDLORD AND TENANT. Under the present statute a landlord may maintain an action of unlawful detainer against a tenant holding over, notwithstanding he may never, himself, have been in the actual possession of the premises. The tenant's possession is the landlord's, and is sufficient to support the

action. The fact that the tenant has been in possession for three years before the commencement of the unlawful detainer, is no bar. *Kaulleen v. Tillman*, 510.

FRAUD.

EQUITABLE RELIEF AGAINST FRAUDULENT PARTITION SALE: PARENT AND CHILD. The defendant, being the step-father of the plaintiffs, after their mother's death, by a course of bad treatment, drove all but one of them from the home which had been left them by their father, and continued himself to occupy the property, as he had done for years previously. The plaintiffs were all minors at the time. Shortly afterwards he caused himself to be appointed guardian of the one who remained with him, and as guardian, immediately instituted proceedings for the partition of the property. The writ was served upon the present plaintiffs, but being unable to read, they did not understand what it meant. The proceedings resulted in a decree for partition, and, at the instance of the present defendant, a sale was ordered. The sale was advertised according to law, and defendant became the purchaser at the price of $100. The land was, at the time, worth $700 or $1,000. Defendant paid the purchase money, but it was subsequently refunded to him by the sheriff, none of the plaintiffs receiving any share of it. Defendant did not inform any of the plaintiffs that the partition proceedings were pending, or that a sale was to take place, although he often saw them, nor did any of them, except, perhaps, the eldest, know of the fact; neither did he mention the matter to any of his neighbors. Plaintiffs having sued to have the sale and the sheriff's deed executed in pursuance of it set aside as fraudulent; *Held*, that they were entitled to such relief, and a decree in their favor was affirmed. *Henrioid v. Neusbaumer*, 96.

2. ———: FRAUDULENT IN PART, FRAUDULENT IN TOTO. Under the circumstances detailed above, the fact that at the time of the sale one of the present plaintiffs was of age, and perhaps knew that it was to take place, and that the present defendant was not the guardian of any but the youngest, and, therefore, was not by law disabled to buy the interests of the others, was held no obstacle to a decree setting aside the entire sale. A court of equity will not go into vulgar fractions to ascertain what proportion of such a transaction may be upheld. *Ib.*

3. ———: NO LACHES. Plaintiffs did not bring their suit until eight years after the sale. In the meantime defendant had put improvements on the land to the value of $500. Plaintiffs all lived in the same county during the whole time; but it was not shown that they discovered the fraud which had been practiced on them before the improvements were made; *Held*, that no such laches was proven as ought to preclude the plaintiffs from equitable relief. *Ib.*

4. EQUITABLE INTERFERENCE AS BETWEEN PARTIES NOT IN PARI DELICTO. Where one who reposes confidence in another, has been induced by the fraudulent misrepresentations of the latter to attempt the perpetration of a fraud, the two are not *in pari delicto*, and as between them the rule in favor of the possessor cannot be invoked to prevent equity from interfering on behalf of the former. *Poston v. Balch*, 115.

6. CASE ADJUDGED. The plaintiff and his wife, having determined to separate, agreed upon a division of property, and she accepted a portion in lieu of alimony and other claims against his estate. Previous to this, she had instructed her attorney to institute a suit on her behalf for a divorce. The attorney not being apprised of the financial settlement, inserted in the petition a claim for alimony. The husband not knowing that this was done by mistake, became greatly alarmed. While in this state of mind, he visited the present defendant, who was an old acquaintance and apparently warm friend. During the visit he disclosed his troubles with his wife, and requested the defendant's intercession to induce her to withdraw her claim. The defendant undertook the mission, but instead of carrying it out in good faith, urged her to insist upon her claim. She, however, declined, and declared her purpose of standing by the arrangement already made. The defendant, nevertheless, reported to the plaintiff that she would insist on the claim as made in the petition, and suggested to him, as a means of defeating her, that he should put his property into the hands of a friend. Acting on this suggestion, plaintiff did, for a nominal, or, at least, an inadequate consideration, transfer all of his property to defendant. Having subsequently discovered the fraud practiced upon him, plaintiff brought this suit to set aside the transfer, and to subject certain real estate, for which defendant had exchanged the property, to a lien for its value. *Held*, that the parties were not *in pari delicto*, and equity would afford the relief sought. *Ib.*

6. CONSTRUCTIVE FRAUD: SECRET RESERVATION OF USE. The fact that the grantor in a deed, absolute on its face, by a secret contemporaneous instrument reserves to himself, for life, the use of the property conveyed, is evincive of legal, if not actual fraud. *Donovan v. Dunning*, 436.

7. UPON examination of the evidence the court finds a deed in controversy in this case, to have been executed in fraud of creditors. *Ib.*

8. THIS being a suit in equity to divest title out of the defendants and vest it in plaintiffs, on the ground that it was obtained by defendants through fraud and breach of trust, the court examines the evidence and affirms the judgment of the lower court in favor of defendants. *Michel v. Tinsley*, 442.

FRAUDULENT REPRESENTATION OF SOLVENCY. See Conover v. Berdine, 125.

CREDITORS OF INSOLVENT CORPORATION COMBINING TO BUY CORPORATE PROPERTY, NO FRAUD, WHEN. Kitchen v. The St. Louis, Kansas City & Northern Railway Company, 224.

TREBLE TAXATION BY WAY OF PENALTY FOR FRAUD. See the State ex rel. Ferguson v. Moss, 495.

SEE STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

1. CONVEYANCE TO WIFE IN FRAUD OF HUSBAND'S CREDITORS. A hus-

band, for the purpose of defrauding his creditors, caused land bought with his money to be conveyed to his wife. He and she then joined in a conveyance to a trustee for the benefit of one of his creditors. Subsequently another of his creditors caused his interest in the land to be taken in execution, and became the purchaser at the execution sale. In a contest between this purchaser and a purchaser at a sale made by the trustee in pursuance of the provisions of the deed of trust, *Held*, that the latter had the better title and superior equity. The fact that the legal title was put in the wife in fraud of the husband's creditors could not destroy the legal effect of the deed of trust in passing the husband's interest in the land. *St Louis Mutual Life Insurance Company v. Cravens*, 72.

2. A MORTGAGE VOID IN PART ONLY. A mortgage covering the fixtures and furniture of a drug store and also the stock of drugs, will not be held void as to the fixtures and furniture, because as to the stock of drugs it is invalidated by the fact that the mortgageor, with the consent of the mortgagee, remained in possession and continued his usual business of selling the drugs. (Following *State to use, &c., v. Tasker*, 31 Mo. 445; *State to use, &c., v. D'Oench*, 31 Mo. 453.) *Donnell v. Byern*, 468.

3. A CONVEYANCE HELD FRAUDULENT. The conveyance in this case assailed for fraud was executed while the grantor was free from debt, but it was voluntary, and was one of several deeds of like character conveying all the grantor's property to his children made when he was on the eve of engaging in a hazardous business enterprise, and, as the court found, to secure him a retreat in the event of probable pecuniary disaster; *Held*, that as against a subsequent creditor it was fraudulent and void. *Fisher v. Lewis*, 629.

GUARDIAN AND WARD.

1. SALE BY GUARDIAN OF WARD'S PROPERTY: ACCOUNTING FOR PROCEEDS: CONVERSION. If a guardian fully accounts for the proceeds of an unauthorized sale of a note belonging to his ward's estate, the purchaser will not be liable to the ward as for conversion, although he bought with notice that the note was the ward's property; neither will the maker after payment to the purchaser be liable to pay again to the ward, although he also knew the facts when he paid. *Gum v. Swearingen*, 553.

2. LIABILITY OF GUARDIAN'S SURETIES. The sureties in a guardian's bond are not liable for any default which occurred before they became sureties. *Ib.*

FRAUD OF GUARDIAN. See Henrioid v. Neusbaumer, 96.

HANNIBAL, CITY OF.

HANNIBAL CITY CHARTER: MAINTENANCE OF STREETS, ROADS, BRIDGES AND PAUPERS: PARTITION OF COUNTY REVENUE: CONSTITUTIONAL LAW. The charter of the city of Hannibal imposed upon the city exclusively the duty of making and maintaining the streets, roads and bridges within its own limits, and of maintaining and supporting its own poor. (Acts 1873 p. 254, article 8, § 1.) With a view of ex-

empting the citizens of Hannibal from the payment of a county tax to be used for the like purposes in the county of Marion outside the limits of the city, the act further provided that whenever the county court should expend any money on roads or bridges or paupers outside the limits of the city, the county should pay over to the city a sum which should bear the same proportion to the amount so expended as the assessed value of the property in the city should bear to that of the property in the remainder of the county. *Held*, on the authority of *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 5, and the *State ex rel. the Police Commissioners v. St. Louis Co. Ct.*, 34 Mo. 546, that the Legislature had the power to direct the county revenue to be disbursed in this manner. *The City of Hannibal v. The County of Marion*, 571.

HIGHWAYS.

See Roads.

HOMESTEAD.

1. Sheriff's return setting off homestead: practice. A motion to quash the return of the sheriff setting off a homestead, is the proper proceeding when the exemption cannot legally be claimed against the judgment on which the execution issued. *Creath v. Dale*, 41.

2. None as against a note for purchase price. D purchased of C a farm in part payment of which he gave his note. D afterwards exchanged this farm for another, which he claimed as his homestead; *Held*, that it was not exempt from execution upon a judgment obtained on the note. *Ib.*

3. The mere fact that a defendant in execution has occupied land for a series of years, and that the land is of less value than $1,500, does not exempt it from execution as his homestead. It must further appear that he is a housekeeper or head of a family and has his dwelling upon it. *Graham v. Lee*, 334.

4. Head of a family. Any man who has a wife is the head of a family, within the meaning of the homestead act. It does not matter that his wife may have deserted him, and may be residing in another State, and that he may himself be living in improper relations with another woman. (*Brown v. Brown*, 68 Mo. 388.) *Whitehead v. Tapp*, 415.

HUSBAND AND WIFE.

1. Married woman's property exemption: waiver. The exemption under Wagner's Statutes, section 24, page 935, of the rents, issues and products of the real estate of a married woman is a personal right and must be claimed by herself. If waived by her it cannot be set up by a creditor. *Abernathy v. Whitehead*, 28.

2. Conveyance to wife in fraud of husband's creditors. A husband, for the purpose of defrauding his creditors, caused land bought with his money to be conveyed to his wife. He and she

then joined in a conveyance to a trustee for the benefit of one of his creditors. Subsequently another of his creditors caused his interest in the land to be taken in execution, and became the purchaser at the execution sale. In a contest between this purchaser and a purchaser at a sale made by the trustee in pursuance of the provisions of the deed of trust, *Held*, that the latter had the better title and superior equity. The fact that the legal title was put in the wife in fraud of the husband's creditors could not destroy the legal effect of the deed of trust in passing the husband's interest in the land. *St. Louis Mutual Life Insurance Company v. Cravens*, 72.

3. THE WIFE IS A NECESSARY PARTY to an action by her husband to recover her interest in trust funds. *Mertens v. Loewenberg*, 208.

4. WIFE'S SEPARATE MEANS: MARRIED WOMAN'S ACT OF 1875 CONSTRUED. Where the wife sells her real estate for money, the transaction amounts to a purchase of the money with her separate means within the meaning of those terms as used in the married woman's act of 1875, (Acts 1875, p. 61). If such money comes into the possession of the husband he cannot dispose of it without her consent in writing.

Accordingly in a case where a husband having possession of his wife's money so acquired, deposited it in bank, and subsequently drew it out and appropriated it to his own use, the bank was held liable to make good the amount to her. *Rodgers v. The Bank of Pike County*, 560.

5. WIFE'S RATIFICATION OF HUSBAND'S CONTRACT. The evidence to establish a ratification by the wife of a contract made by her husband as her agent, must be of an unmistakable character. *Ib.*

6. HUSBAND AND WIFE: PRACTICE: JEOFAILS. A married woman cannot maintain an action alone; and where an action is so brought, and the attention of the trial court is called to the non-joinder of the husband, both by answer and by prayer for instruction to the jury, a judgment in the wife's favor will be reversed. The statute of jeofails does not cure the error. *Ib.*

7. MARRIED WOMAN CHARGING HER SEPARATE ESTATE. The fact that a deed which, by apt words, conveys a separate estate to a married woman requires that her husband shall join in any conveyance she may make, does not prevent her from subjecting the land to the payment of her debts in the ordinary way. *Gay v. Ihm*, 584.

8. ——: LEASE. If a married woman executes a lease containing a covenant to pay rent, she thereby binds her separate estate for the rent. *Ib.*

9. PUBLIC HIGHWAY, DEDICATION OF. A man cannot make a valid dedication of land belonging to his wife and children to public use as a highway. *McBeth v. Trabue*, 642.

IDENTITY OF PERSONS.

PRESUMPTION IN FAVOR OF COURT OF GENERAL JURISDICTION: DEMURRER. The records of the circuit court showed that on the 8th day of Oc-

tober, 1875, Roach Millsaps was arrested on a charge of stealing certain property described in the warrant; that on the 20th day of October, 1875, Pharris Millsaps, Jr., as principal, with others as sureties, entered into a recognizance for the appearance of said Pharris Millsaps, Jr., at the next January term of the circuit court to answer to the charge of larceny; that at the January term Roach Millsaps was indicted for the larceny of the property described in the warrant, and that at a subsequent day of the same term a forfeiture was ordered of the recognizance of Pharris Millsaps, Jr. On appeal from a judgment on a demurrer to a *sci. fa.* issued on the recognizance, *Held, first*, that this court would presume in favor of the acts of the circuit court that Roach Millsaps and Pharris Millsaps, Jr., were one and the same person; *Second*, but at any rate, since this was a matter of fact and not of law, a demurrer would not lie. *The State v. Millsaps*, 359

INJUNCTION.

1. AGAINST A JUDGMENT. Before a court of equity will enjoin the enforcement of a judgment regular on its face, the complainant must aver and prove some injustice in the judgment, and this can only be shown by stating a valid defense to the original claim. It is not sufficient to aver that the complainant's attorney thinks his defense a good one. The defense should be stated that the court may decide upon its value. *Sauer v. City of Kansas*, 46.

2. INJUNCTION will issue to prevent the invasion of a right secured by statute without proof of damage. *St. Louis Railroad Company v. Northwestern St. Louis Railway Company*, 65.

3. COUNTY SUBSCRIPTION TO RAILROADS: INJUNCTION AGAINST, BY CITIZENS AND TAX-PAYERS. If a railroad company fails to comply with the conditions on which a county subscription has been made to its stock, injunction will lie to prevent it receiving bonds agreed to be issued in payment, and to compel the surrender and cancellation of any already issued; and this remedy may be invoked by any one who is a citizen and tax-payer of the county. *Wagner v. Meety*, 150.

4. INJUNCTION AGAINST EXECUTION. Equity will interpose by injunction to prevent a sale under execution of property held by a board of education for public school purposes. *The State to use of the Board of Education v. Tiedemann*, 306.

5. EMINENT DOMAIN: INJUNCTION TO COMPEL PAYMENT OF DAMAGES. When a railroad company, for whose use land has been condemned and taken, has become insolvent, and the owner has appealed in vain to all the statutory remedies for collection of his damages, a court of equity will afford relief by ordering payment, and, in default of payment, will restrain the original company or any company holding under it from operating the road on his land. The time within which payment should be made in order to avoid the consequences of default, should be prescribed in the final decree. It is not sufficient that it be prescribed in an interlocutory decree. *Provolt v. The Chicago, Rock Island & Pacific Railroad Company*, 633.

INSOLVENCY.

EVIDENCE OF REPUTED INSOLVENCY. See Conover v. Berdine, 125.

INSTRUCTIONS.

1 WHERE an appropriate instruction is given, it is no error to refuse another to the same effect. *Anthony to use of Deggendorf v. Bartholow*, 186.

2. HARMLESS ERROR. Defendant being indicted for stealing a mare, the court correctly instructed the jury, both on the theory that she was stolen in the county of the trial, and on the theory that she was stolen in another county and then imported into the county of trial. There was evidence that the theft was committed in the latter county. *Held*, that even if there was no evidence of larcenous taking in the other county, no error had been committed prejudicial to defendant. *The State v. Ware*, 332.

3. ERRONEOUS, NOT NEUTRALIZED BY CORRECT INSTRUCTIONS. A homicide though willful, is not murder in the first degree unless committed with deliberation; and it is a fatal error to give an instruction which ignores the element of deliberation, notwithstanding another instruction is given correctly defining the crime. *The State v. Hill*, 451.

4. AN INSTRUCTION which submits a question of law to the jury for their determination, is properly refused. *Morgan v. Durfee*, 469

5. INSTRUCTIONS not based on any evidence given in the case, are properly refused. *The State v. Degonia*, 485.

6. ERROR committed in admitting evidence to the jury is not cured by the giving of instructions correctly declaring the law, unless the objectionable evidence is expressly withdrawn from their consideration. *Glascock v. The Chicago & Alton Railroad Company*, 589.

7. WHEN the instructions in a case are so contradictory that it is impossible to say on what ground the verdict of the jury was based, if any of them are incorrect, the judgment must be reversed. *Staples v. The Town of Canton*, 592.

INSURANCE.

LIFE INSURANCE: WAIVER OF RIGHT TO FORFEIT OR COMMUTE. If a life insurance company by its course of dealing with a policy holder leads him to believe that the strict terms of the policy touching the prompt payment of premiums, will not be insisted on, and he dies without having paid the premium, and before any forfeiture or commutation has been declared, the company cannot, afterwards, treat the policy as forfeited or commuted. *Hanley v. The Life Association of America*, 380.

INTEREST.

PRINCIPAL AND SURETY: RELEASE OF SURETY BY EXTENDING TIME OF PAYMENT: USURIOUS INTEREST. An agreement between the creditor and

the principal debtor to extend the time for payment of the debt for a definite period, if founded upon a sufficient consideration and made without the surety's consent, will discharge the surety. Payment of interest in advance is a sufficient consideration, even if it be at a usurious rate. One who signs a note as joint maker, will be allowed the benefit of this rule as against an indorsee for value, if it appears that he is really a surety, and the note was executed by him and was taken by the indorsee with the understanding that he should occupy that position. *Stillwell v. Aaron*, 539.

SEE STEPHENS V. BURGESS, 168.

INTERPLEA.

IN ATTACHMENT. Wagner's Statute, section 52, page 192, which provides that in attachment proceedings "any person claiming property, &c., may interplead," includes only those who claim to own the property attached. A garnisher of a debt has no such claim. *Abernathy v. Whitehead*, 28.

INTOXICATING LIQUORS.

NOT TO BE FURNISHED TO JURORS. See the State v. West, 401.

JEOFAILS.

THE STATUTE OF, DOES NOT CURE FATALLY DEFECTIVE PETITION. See Weil v. Greene County, 281.

——— NOR INDICTMENT. See the State v. Blan, 317.

IN SUITS FOR BACK TAXES. See Wellshear v. Kelley, 343.

NON-JOINDER OF HUSBAND IN SUIT BY WIFE, NOT CURED, WHEN. See Rodgers v. The Bank of Pike County, 560.

JUDGMENT.

1. FORM OF. In an action to recover for improvements brought by a defeated defendant in ejectment, the statute (Wag. Stat., p. 561, § 20) does not authorize an absolute money judgment. *Malone v. Stretch*, 25.

2. AS EVIDENCE IN FAVOR OF STRANGER. A judgment by default may be regarded as a solemn admission or judicial declaration of the fact by the parties, and as such is receivable in evidence against them and in favor of a stranger. *The St. Louis Mutual Life Insurance Company v. Cravens*, 72.

3. IN ATTACHMENT. Where the judgment against the defendant in an attachment suit is general, the court cannot direct that the attached property be first sold. The statute expressly directs that the execution, in such case, shall be a common *fi. fa.* Gen. Stat. 1865, p. 569, § 58. *Philips v. Stewart*, 149.

4. SUPPLYING DESTROYED JUDGMENT. In a proceeding to supply a judg-

ment, the record of which has been destroyed, the court should not render a new judgment, but should restore the old one, so as to make the record show when it was rendered, against whom and the amount. This is all that the statute relating to the supplying of lost and destroyed records was intended to accomplish. Gen. Stat. 1865, p. 182. *Julian v. Ward*, 153.

5. "JUDGMENT BY DEFAULT" IN JUSTICE'S COURT. A judgment rendered when a defendant is present, either in person or by attorney, though neither takes any part in the proceeding, is not a "judgment by default" within the meaning of these words as used in the statute providing for appeals from justices of the peace. Wag. Stat., §§ 1, 2, p. 846. *Borgwald v. Fleming*, 212.

6. CASE IN JUDGMENT. In a suit before a justice of the peace, defendant obtained a continuance. On the day to which the case had been continued his attorney appeared and asked for a further continuance, on the ground that the date of the trial had been mistaken by the defendant, who, with his witnesses, was therefore absent. The motion being overruled, the attorney stated he had nothing further to say, and the justice having heard the plaintiff's evidence rendered judgment in his favor; *Held*, that this was not a "judgment by default" within the statute. *Ib.*

7. RES ADJUDICATA: PAROL EVIDENCE. When the record of a former suit shows that the matter in controversy in the pending case was determined in that suit, parol evidence on the same subject is inadmissible. If offered for the purpose of showing that some other matter was also determined, it is immaterial. If offered for the purpose of showing that the same matter was not in point of fact determined, it contradicts the record. In either event it should be rejected. *Armstrong v. The City of St. Louis*, 309.

8. A JUDGMENT NOT COLLATERALLY ASSAILABLE. The validity of a judgment rendered in a suit brought by the collector to recover back taxes, cannot be attacked in a collateral proceeding for defect of the petition in that case in failing to allege that the land had been returned delinquent, or had been forfeited to the State, or in failing to allege that the county clerk, within the time provided by the act, had made out a back tax book and delivered it to the collector, and that the land was contained in this book, and remained unredeemed, or in failing to allege that the suit was against the owner of the land. *Wellshear v. Kelley*, 343.

9. ———: LIMITATIONS. The validity of a judgment rendered in such a suit cannot be attacked in a collateral proceeding by showing that it appeared upon the face of the petition in that case that a portion of the taxes sued for and embraced in the judgment, were barred by the statute of limitations, supposing that statute to be a good defense as against the State. *Ib.*

10. ———. A sheriff having sold land in partition, took notes for the purchase money payable to himself, or his successor in office. Without any order of court authorizing him so to do, his successor took possession of the notes and brought suit upon them, obtained a judgment for the enforcement of a vendor's lien, and subsequently caused the land to be sold under the judgment. In ejectment for the land brought by the purchaser at this sale; *Held*, that the

right of the successor to bring the suit and procure the judgment could not be collaterally called in question by the parties to the partition suit, or by any one claiming under them, with notice of the vendor's lien suit. *Dunham v. Wilfong*, 355.

11. ———. A recital in a judgment that the defendants were legally served with process cuts off all inquiry in a collateral proceeding as to the legality of the service. *Ib.*

12. FORMER JUDGMENT: RELATION OF ASSIGNEE IN BANKRUPTCY TO SECURED CREDITOR. The judgment in a suit brought by an assignee in bankruptcy to set aside as fraudulent a deed made by the bankrupt, is not binding upon a creditor of the bankrupt who had reduced his demand to judgment and had thus acquired a lien prior to the adjudication of bankruptcy, and was not made a party to the assignee's suit. Such a creditor having an interest hostile to the interests of the general creditors, the assignee could not be considered to have represented him in the prosecution of the suit. *Fisher v. Lewis*, 629.

13. EMINENT DOMAIN: JUDGMENT ON A SECOND ASSESSMENT OF DAMAGES. Where a second assessment of damages is made in a proceeding to condemn land for railway purposes, the court must render judgment for the full amount found by the commissioners. If money has been paid into court upon a former assessment, which has since been set aside at the instance of the land owner, it cannot be treated as a payment or allowed as a credit on the judgment. *Provolt v. The Chicago, Rock Island & Pacific Railroad Company*, 633.

INJUNCTION AGAINST. See Sauer v. City of Kansas, 46.

FOREIGN PROBATE OF A WILL, A JUDICIAL PROCEEDING WITHIN THE MEANING OF THE ACT OF CONGRESS OF 1790. See Lewis v. The City of St. Louis, 595.

JURISDICTION.

1. EJECTMENT: IMPROVEMENTS: WHEN AND WHERE RECOVERABLE. An action under Wag. Stat., section 21, page 561, by a defendant in an ejectment suit against whom a judgment for possession has been rendered, to recover compensation for improvements made in good faith on the land prior to the action of ejectment, must be brought in the court in which such judgment was rendered, and before eviction from the premises. *Malone v. Stretch*, 25.

2. PRACTICE. A court to which a cause has been transferred by another court without authority of law, has no jurisdiction to enter an order of dismissal. It can do no more than strike the cause from its docket. *Ewing v. Brooks*, 49.

3 PATENTS: JURISDICTION OF STATE COURTS. State courts have the right to inquire into the validity of a patent for an invention issued by the United States when the question comes up collaterally, as where an action on a promissory note given in consideration of the assignment of an interest in a patent is defended on the ground that the patent is void. *Keith v. Hobbs*, 84.

4. OF BARTON COUNTY PROBATE COURT. The act of March 19th, 1866, establishing probate courts for Barton and other counties, (Sess. Acts 1865-6, p. 84,) conferred upon those courts exclusive original jurisdiction of all demands against the estates of deceased persons. The fact that a living person was jointly liable with the estate of a decedent would not authorize the circuit court to take jurisdiction. *Julian v. Ward*, 153.

5. OF THE CIRCUIT COURT. The circuit court has jurisdiction, under the act of 1877, to hear and determine suits for back taxes. *Wellshear v. Kelley*, 343.

6. ATCHISON PROBATE COURT: CRIMINAL JURISDICTION. The probate court of Atchison county has power to admit to bail and take recognizances from persons charged with crime. *The State v. Millsaps*, 359.

JURY.

1. COMPETENCY OF JUROR. A person who, upon examination on the *voir dire*, declares that he would not convict one accused of murder upon circumstantial evidence, or that he would have scruples in doing so, is not competent to sit as a juror upon a trial for murder. *The State v. West*, 401.

2. VERDICT: INTOXICATING LIQUOR IN THE JURY ROOM: CONTEMPT. It is improper, and should be held a contempt of court for any officer to furnish the jurors engaged in the trial of a cause with intoxicating liquor But in the absence of proof of intoxication or other improper conduct on their part, the fact that such liquor has been furnished to them, and used by them, is no ground for setting aside a verdict. *Ib.*

3. CHALLENGE TO THE ARRAY. In the absence of evidence of bias or prejudice on the part of the sheriff, it is no ground for a challenge to the array, that after the court had quashed the return upon a former *venire*, because the officer who had executed it had not first taken the oath of impartiality required by statute, he had served a second *venire* by summoning as jurors the same persons who had been summoned before. HENRY, J., and SHERWOOD, C. J., dissenting. *The State v. Degonia*, 485.

4. PEREMPTORY CHALLENGES. In criminal cases the State must announce her peremptory challenges before the defendant can be compelled to make his. (Following *State v. Steeley*, 65 Mo. 218.) *Ib.*

5. VERDICT. The fact that the officer having a jury in charge furnished the jurors with cigars, is no ground for setting aside the verdict; neither is the fact that during a recess of the court a stranger was in the room where the jury was kept by the sheriff, it appearing that nothing whatever was said about the cause on trial. *Ib.*

6. COSTS. The expense of boarding a petit jury impaneled to try a murder case, cannot be taxed as costs against the county. *Bright v. Pike County*, 519.

7. JURY TRIAL IN CHANCERY CAUSES. In chancery causes the right of trial by jury does not exist. The chancellor may, if he sees fit, direct issues of fact to be tried by a jury; but even then he will not be bound by their finding. *Gay v. Ihm*, 584.

TRIAL BY JURY. See the State ex rel. Ferguson v. Moss, 495.

JUSTICES' COURTS.

1. APPEAL FROM "JUDGMENT BY DEFAULT." A judgment rendered when a defendant is present, either in person or by attorney, though neither takes any part in the proceeding, is not a "judgment by default" within the meaning of these words as used in the statute providing for appeals from justices of the peace. Wag. Stat., §§ 1, 2, p. 846. *Borgwald v. Fleming*, 212.

2. CASE IN JUDGMENT. In a suit before a justice of the peace, defendant obtained a continuance. On the day to which the case had been continued his attorney appeared and asked for a further continuance, on the ground that the date of the trial had been mistaken by the defendant, who, with his witnesses, was therefore absent. The motion being overruled, the attorney stated he had nothing further to say, and the justice having heard the plaintiff's evidence rendered judgment in his favor; *Held*, that this was not a "judgment by default" within the statute. *Ib.*

3. PRACTICE ON APPEAL FROM JUSTICE'S COURT. In an action commenced before a justice of the peace, a plea of *non est factum* may be filed for the first time in the circuit court. *Moore v. Hutchinson*, 429.

4. APPEAL PREVENTED BY JUSTICE'S ABSENCE: APPELLANT'S REMEDY. When a party takes the proper steps to secure an appeal from a justice of the peace in time, but fails on account of the absence of the justice, his remedy is to obtain a rule upon the justice from the court which would have jurisdiction of the appeal, requiring him to allow it. Wag. Stat. p. 849, § 10. An appeal allowed after the time has expired, without such rule, is irregular and is properly dismissed on motion in the upper court. *Pearson v. Carson*, 569.

KANSAS CITY.

1. PAY OF KANSAS CITY POLICE. The act of March 27th, 1874, establishing the board of police commissioners for the City of Kansas, vested in the board the power of fixing the pay of policemen, and the amended city charter of 1875 did not take it away. *Flanagan v. the City of Kansas*, 462.

2. REMEDY BY MANDAMUS TO ENFORCE PAYMENT. A policeman appointed by the board of police commissioners of the City of Kansas, under the act of March 27th, 1874, establishing the board and authorizing the appointment of a police force, (Sess. Acts 1874, p. 327,) could not, without first obtaining from the board a warrant on the city treasury, maintain an action against the city for his services. If he could not get either his pay or a warrant for his pay,

his remedy was by mandamus against the board. *Sanford v. The City of Kansas*, 466.

POWERS OF CITY ATTORNEY. See City of Kansas v. Flanagan, 22.

ACT OF 1873 EXTENDING CITY LIMITS HELD CONSTITUTIONAL. See The City of Kansas v. Cook, 127.

LACHES.

A CASE WHERE THE DELAY DID NOT AMOUNT TO LACHES. See Henrioid v. Neusbaumer, 96.

LACHES OF STOCKHOLDERS IN REPUDIATING ACTS OF THE CORPORATION. See Kitchen v. The St. Louis, Kansas City & Northern Railway Company, 224.

LANDLORD AND TENANT.

1. UNLAWFUL DETAINER BY TENANT. Under the present statute a landlord may maintain an action of unlawful detainer against a tenant holding over, notwithstanding he may never, himself, have been in the actual possession of the premises. The tenant's possession is the landlord's, and is sufficient to support the action. The fact that the tenant has been in possession for three years before the commencement of the unlawful detainer, is no bar. *Kaulleen v. Tillman*, 510.

2. If a married woman executes a lease containing a covenant to pay rent, she thereby binds her separate estate for the rent. *Gay v. Ihm*, 584.

3. ATTACHMENT OF GROWING CROP FOR RENT. The growing crop of a tenant is subject to attachment by the landlord for rent due. (*Hubbard v. Moss*, 65 Mo. 647.) *Crawford v. Coil*, 588.

4. FORFEITURE OF LEASE: MUNICIPAL LAW. A lease granted by the town of Carondelet provided that, in case of the failure of the tenant to pay rent, the board of trustees of the town might, by order or resolution to be entered of record among the acts and proceedings of the board, declare the lease void. *Held*, that a resolution not so entered of record was ineffectual to break the lease. (*Graham v. Carondelet*, 33 Mo. 262.) *Lewis v. The City St. Louis*, 595.

5. ——: TENDER BEFORE FORFEITURE. A declaration of forfeiture by a landlord, under a clause in the lease authorizing him to declare a forfeiture in case of non-payment of rent for a stated length of time, will be ineffectual, if, before the declaration is made, though after the expiration of the stated time, the tenant makes a tender of all rent then in arrear. *Ib.*

CONFISCATION OF RENTS BY UNITED STATES MILITARY AUTHORITIES. TENANT STILL LIABLE TO LANDLORD. See Clark v. Mitchell, 627.

LASCIVIOUS BEHAVIOR.

INDICTMENT FOR, HELD SUFFICIENT. An indictment, founded on 1 Wag. Stat., § 8, p. 500, charged that defendants, at a certain time and place, were guilty of open, gross lewdness and lascivious behavior, and were then and there guilty of open and notorious acts of public indecency, grossly scandalous, by then and there publicly, lewdly and lasciviously abiding and cohabiting with each other; *Held*, to be sufficient, (following *The State v. Bess*, 20 Mo. 419). *The State v. Osborne*, 143.

LAWYERS.

1. LAWYERS' LICENSE TAX: ST. LOUIS CHARTER POWERS. Section 20, of article 10, of the constitution of 1875, by necessary implication, authorized the board of freeholders to make proper provision in the charter which they framed for the city of St. Louis, for the raising of revenue, and to that end authorized them to incorporate the provision which conferred upon the city the power to impose a license tax upon lawyers. They needed no additional authorization by the General Assembly. *The City of St. Louis v. Sternberg*, 289.

2. THE STATE'S RIGHT TO TAX LAWYERS. The power of the State to impose a license tax on lawyers has been beyond question ever since the decision of this court in *The State v. Simmons*, 12 Mo. 268. *Ib.*

3. LAWYERS' LICENSE TAX: UNIFORMITY OF TAXATION. The ordinance of the city of St. Louis imposing a tax of $25 a year on every lawyer in the city without reference to the value of his practice, is not obnoxious to the constitutional provision which requires that taxation shall be uniform. When a municipality having power to tax callings, trades and professions, taxes alike all persons engaged in the same business, such taxation is equal and uniform. *American Union Express Co. v. St. Joseph*, 66 Mo. 675. *Ib.*

4. ———: CRIMINAL PROSECUTION TO ENFORCE. The city of St. Louis had the right, under its charter, to impose, and, by criminal prosecution, to enforce penalties for the violation of the ordinance prohibiting lawyers from practicing their profession without paying a license tax. *Ib.*

LETTERS-PATENT.

SEE PATENTS.

LICENSE.

LAWYERS' LICENSE TAX. See the City of St. Louis v. Sternberg, 289.

LIENS.

OF COUNTY CLERK'S CERTIFICATE OF COLLECTOR'S DELINQUENCY. An abstract of a settlement of a delinquent collector with the county court was filed with the clerk of the circuit court attested thus: "Witness my hand this 17th day of August, 1863. J. O. Jewett, county clerk Schuyler county, Missouri." The statute provided that when such a settlement was filed with the clerk of the circuit court, certified by the clerk of the county court under his hand *and seal of office*, it should operate a lien upon the real estate of the collector, and could be carried into effect in the same manner and with like effect as a judgment of the circuit court; *Held*, that the statute should be strictly construed, and as the certificate in question lacked the seal of the county court, it conferred no lien, and no execution could issue on it. *Sidwell v. Birney*, 144.

LIMITATIONS.

1. ADVERSE POSSESSION: PRINCIPAL AND SURETY. A sold a tract of land to B, from whom it passed by mesne conveyances to the defendant, who took possession. The sale to B was on credit, B giving his bond for the purchase money with plaintiff as surety. Plaintiff being compelled to pay the bond, took a conveyance of the land from A, and brought this suit to recover possession. Defendant relied on the statute of limitations; *Held*, that the possession of B, and of the defendant under him, was subordinate to the rights of A, and in the absence of evidence to show that it ever assumed a hostile character, the statute never commenced to run. Plaintiff was, therefore, entitled to recover; but upon refunding to the plaintiff the amount of the purchase money, defendant could retain the land. *Fulkerson v. Brownlee*, 371.

2. STATUTE OF LIMITATIONS. A party not in the possession of land cannot invoke the statute of limitations to prevent the correction of errors in a deed under which the possessor claims title. *Michel v. Tinsley*, 442.

3. ACQUISITION OF A RIGHT TO USE A ROAD BY THE PUBLIC UNDER THE STATUTE OF LIMITATIONS. The public will acquire a right to the use of a road over the land of an individual, without condemnation or dedication, by long use acquiesced in by the owner, or by adverse occupancy and use for a period of time equal to that prescribed by the statute of limitations for bringing actions of ejectment. If, after it has been so used by the public for that length of time, the owner undertakes to fence across it, he will be liable to indictment and punishment as for obstructing a public highway. *The State v. Walters*, 463.

4. POSSESSION WITHOUT COLOR OF TITLE: COLOR OF TITLE WITHOUT POSSESSION: CASE ADJUDGED. In an action of ejectment for an eighty acre tract, the following state of facts appeared: The land was entered by plaintiffs' ancestor in 1832, and a patent issued to him in 1835, after his death. In 1833 W began to claim the land. In 1841 he mortgaged it to N, and in 1842 sold it to N, who died in 1865. It was subsequently partitioned among the heirs of N, and defendant claimed title by deed from one of the heirs. It was assessed to W

from 1832 to 1843, and from that time to N until the sale to defendant, and after that to defendant. Between 1862 and 1872 rails were made on the land two or three times, and trespassers were several times driven off by N. The land was known in the neighborhood as N's. W owned a tract adjoining the tract in controversy, and from 1837 to his death in 1853 cultivated a field of twenty acres, five acres of which were embraced in the land in controversy. This latter fact was not known to N when he bought of W, and never became known until a survey was made in 1857. After it became known to him he took no steps to dispossess the widow of W who was continuing her husband's possession. Nor did she ever become his tenant as long as she remained in possession of the field, which was until 1864. From that year no part of the eighty acres in controversy was occupied by any one until defendant entered in 1874. On this state of facts, *Held*, that defendant could not successfully interpose the statute of limitations as a defense. The possession of W and his widow was without color of title, while N's color of title was unaccompanied by possession. *Avery v. Adams*, 603.

MALICE.

AN instruction which uses the term "malice" without defining it, should not be given. *Morgan v. Durfee*, 469.

MANDAMUS.

1. TO COMPEL COUNTY TREASURER TO PAY COUPONS: COUNTY WARRANT. The holder of county interest coupons is not obliged to obtain a warrant on the county treasury before demanding payment. It is the duty of the treasurer, if he has funds, to pay on presentation of the coupons at the treasury. If he refuses, he may be compelled by mandamus. The fact that the funds have been withdrawn by the county court since demand was made will be no defense to him; neither will the fact that the validity of the coupons is being contested by the county in another proceeding. *The State ex rel. Lane v. Craig*, 565.

2. PRACTICE IN MANDAMUS. In a proceeding by mandamus to compel the county treasurer to pay county interest coupons out of funds in his hands, it is not necessary to file the coupons as exhibits. *Ib.*

REMEDY OF POLICEMAN TO ENFORCE PAYMENT OF HIS SALARY. See Sanford v. The City of Kansas, 466.

MASTER AND SERVANT.

1. RAILROAD COMPANIES: DUTY TO EMPLOYEES AS TO MECHANICAL APPLIANCES. Railroad companies are bound to use appliances which are not defective in construction; but as between them and their employees they are not bound to use such as are of the very best or most improved description. If they use such as are in general use, that is all that can be required.

This principle applied to the use of the T rail for a guard to railroad switches, it appearing that although a guard made of U rail

would be safer for employees, and would answer the purpose of the company equally well, yet the T was the one in general use. *Smith v. The St. Louis, Kansas City & Northern Railway Company*, 32.

2. MASTER, WHEN NOT LIABLE TO SERVANT FOR INJURIES INFLICTED BY DANGEROUS MACHINERY. A master is not liable to his servant for injuries received in the use of dangerous machinery, notwithstanding the master may have failed to provide against the danger by the use of known appliances, where the machinery is of the kind in general use, and the danger is obvious to the senses.

This principle applied to a case where the injury occurred in the use of a shaping machine, which the evidence showed was complete without a guard, and was generally so used, but could be, and was sometimes provided with a guard or fender as a security against the negligence of workmen or possible accidents. *Cagney v. The Hannibal & St. Joseph Railroad Company*, 416.

3. PRESUMPTION OF KNOWLEDGE AS BETWEEN MASTER AND SERVANT. There is no presumption that a railroad company, or its superintendent of car shops, has any better means of information as to current improvements in machinery than are accessible to an experienced mechanic in the shops. *Ib.*

4. MEASURE OF RECOVERY BY WIDOW OF A RAILROAD EMPLOYEE FOR THE KILLING OF HER HUSBAND. When a laborer employed by a railroad company is killed in consequence of the use of defective apparatus, a cause of action accrues to his widow under section 3 of the damage act, (Wag. Stat., p. 520,) and not under section 2; and the measure of damages will not be the sum of $5,000, as provided in section 2, but a sum not exceeding that amount as provided in section 3. (*Elliott v. St. L. & I. M. R. R. Co.*, 67 Mo. 272.) *Holmes v. Hannibal & St. Joseph Railroad Company*, 536.

MAXIMS.

IN PARI DELICTO. See Poston v. Balch, 115.

MECHANICS' LIEN.

1. TITLE UNDER, WHEN ENCUMBRANCERS ARE NOT MADE PARTIES. Where suit is brought to enforce a mechanic's lien against premises encumbered by a deed of trust, the parties to which are not made parties to the suit, a sale under an execution in the case will not carry an indefeasible title. The holder of the deed of trust will have the right to redeem. *Heim v. Vogel*, 529.

2. DESCRIPTION OF THE LAND TO BE COVERED. The statement filed for the purpose of asserting a mechanic's lien should so describe the land upon which the house is situated and the acre of ground intended to be covered by the lien, that they can be identified; otherwise no lien will be created. *Wright v. Beardsley*, 548.

MISTAKE.

1. MIXED AND MUTUAL MISTAKE OF LAW AND FACT. An administrator sold lands of his intestate, supposing and representing that it was the fee that he was selling. The purchaser supposed it was the fee that he was buying. It turned out that nothing passed by the sale but the equity of redemption. *Held*, that this was such a case of mixed and mutual mistake of law and fact as entitled the purchaser to relief in equity. *Griffith v. Townley*, 13.

2. REFORMATION OF DEEDS FOR MISTAKE ON THEIR FACE. The court can reform a deed where there are mistakes apparent upon the face of the instrument, without parol testimony to prove the mistake, as for instance, where the seal is omitted, though the deed purports to be under seal, or where there is no granting clause, and there are words of warranty. *Michel v. Tinsley*, 442.

3. STATUTE OF LIMITATIONS. A party not in the possession of land cannot invoke the statute of limitations to prevent the correction of errors in a deed under which the possessor claims title. *Ib.*

MORTGAGES.

SEE DEEDS OF TRUST AND MORTGAGES.

MUNICIPAL CORPORATION.

1. CITY ORDINANCE: REPEAL. A city having power, under its charter, to pass ordinances, may likewise repeal them on such conditions as are reasonable and just. The repeal of an ordinance to suppress gaming, except as to offenses committed and forfeitures incurred previous thereto; *Held*, valid. *City of Kansas v. White*, 26.

2. DUTY OF THE CITY TO BUILD SIDEWALKS: DAMAGES: EVIDENCE. It is the duty of a city, whenever the public convenience or necessities require it, to put the sidewalks of its streets in a reasonably safe condition, and if, instead of performing this duty, it permits the proprietors of adjoining property to construct sidewalks of their own in the street, it will be liable for all damages resulting from their unsafe condition. The passage of ordinances reciting that the common council deem it necessary that a particular sidewalk shall be constructed, and providing for its construction, amounts to an admission by the city that the public necessities require it. *Oliver v. The City of Kansas*, 79.

3. A CITY AUTHORIZED TO ABATE NUISANCES IS LIABLE FOR FAILURE TO EXERCISE THE POWER. If the authorities of a city which is authorized by its charter to declare and abate nuisances, and which has by general ordinance declared all buildings and structures dangerous to the public to be nuisances, after becoming aware of the dangerous condition of a decayed wall situated so near to a street as to imperil the lives of persons passing by on the street, neglect to cause its removal, and a child is crushed to death by the falling of the wall, the city will be held liable in damages, and this, though the wall stood on private property and the child, at the time of the

fall, was not in the street, but was on private property within one foot of the street. *Kiley v. The City of Kansas*, 102.

4. EXTENDING CITY LIMITS: EXEMPTING NEW TERRITORY FROM TAXATION: CONSTITUTIONAL LAW. The 3rd section of the act of March 11th, 1873, extending the limits of Kansas City, (Acts 1873, p. 282,) declared that no subdivision of land in the annexed territory containing over five acres should be subject to city taxation. *Held*, that this did not violate those provisions of the constitution which prohibit the exemption of private property from taxation, and require all to be taxed in proportion to its value. The Legislature had a right to grant the extension on such terms as it thought proper. *Held, also*, that if this section were unconstitutional, the whole act would be, as immunity from city taxation for such tracts was the only condition on which they were annexed; so that whether section 3 was constitutional or not, such tracts were not liable to city taxation. *The City of Kansas v. Cook*, 127.

5. LIABILITY OF A CITY FOR DAMAGES OCCASIONED BY CONSTRUCTION OF RAILROAD IN A STREET. If a city is authorized by law to grant rights of way over its streets to railroad companies, it incurs no liability for damages done to real estate by the occupation of the street upon which it fronts, for a railroad, with its permission, unless they are such as would not have resulted if the road had been properly constructed and operated. *Swenson v. The City of Lexington*, 157.

6. ———. If a city has such authority, it incurs no liability by reason of the fact that a company authorized by it to build and operate its road upon a street, has so constructed an embankment in the street as to cause a pond of water to be formed upon adjacent land, provided the embankment conforms to the established grade of the street and is otherwise so constructed as to cause no damage or inconvenience beyond that necessarily occasioned by the appropriation of a portion of the street for the purpose. *Ib.*

7. MUNICIPAL LIABILITY FOR DAMAGE BY WIND. A city is not liable in damages for injuries inflicted upon a person by the fall of a market house caused by a wind storm of unprecedented force and violence. *Flori v. The City of St. Louis*, 341.

8. MUNICIPAL TAXATION: EXTENSION OF TOWN LIMITS: TOWN PLATS. When the owner of land adjacent to an incorporated town subdivides it into lots and blocks, and files a plat of the subdivision in the recorder's office of the county, under section 8, page 248, General Statutes 1865, the fee of such portions as are designed for streets and other public uses becomes vested in the town, but the addition does not become incorporated into the town so as to make the land liable to taxation for town purposes. *The Town of Cameron v. Stephenson*, 372.

9. FAILURE of a city to erect side-railings to a bridge located in a public street, is not negligence *per se* on the part of the city. Whether it amounts to negligence in a particular case is a question for the jury to determine upon consideration of all the circumstances. *Staples v. The Town of Canton*, 592.

10. FORFEITURE OF LEASE: MUNICIPAL LAW. A lease granted by the town of Carondelet provided that, in case of the failure of the tenant to pay rent, the board of trustees of the town might, by order or resolution to be entered of record among the acts and proceedings of the board, declare the lease void. *Held*, that a resolution not so entered of record was ineffectual to break the lease. (*Graham v. Carondelet*, 33 Mo. 262.) *Lewis v. The City of St. Louis*, 595.

11. ARRAIGNMENT AND PLEA NOT NECESSARY IN PROSECUTION FOR VIOLATION OF MUNICIPAL ORDINANCE. The rule that in order to sustain a conviction for a criminal offense, the record must show that the defendant was arraigned and that a plea was entered, has never been extended to cases other than proceedings by indictment. It does not apply to a prosecution for violation of a city ordinance prohibiting the keeping of a bawdy house. *The City of Lexington v. Curtin*, 626.

DELEGATION OF CITY ATTORNEY'S POWERS. See City of Kansas v. Flanagan, 22.

LAWYERS' LICENSE TAX IN ST. LOUIS, See The City of St. Louis v. Sternberg, 289.

MURDER.

1. THE QUESTION OF DELIBERATION, ONE FOR THE JURY. The court instructed the jury that if defendants had time to think, and did intend to kill deceased, for a moment, then the killing was a willful, deliberate and premeditated killing. *Held*, error. There may be an unlawful intentional killing which is not murder in the first degree. Hence, whether such a killing is deliberate and premeditated or not, is a question for the jury, and cannot be determined as matter of law by the court. *The State v. Williams*, 110.

2. INDICTMENT FOR MURDER: SEVERAL WEAPONS: SEVERAL DEFENDANTS. It is no objection to an indictment for murder, that it charges the assault to have been made with several different weapons, nor, where it is against two persons, that the acts of each are not separately stated. *The State v. Blan*, 317.

3. ———: ESSENTIAL ALLEGATIONS: JEOFAILS. An indictment for murder need not describe the wounds inflicted; but it should allege an assault, and the nature thereof, a mortal wounding of the deceased and that he died of such wounds within a year and a day. It is not sufficient to allege that defendant "did kill and murder the deceased by striking, hitting and mortally wounding him with sticks and clubs;" or that defendant "did shoot, kill and murder the deceased with loaded guns;" or that defendant "assaulted the deceased with sticks, clubs and loaded guns, and did kill and murder him, by striking him with clubs and shooting him with loaded guns." Wag. Stat., Sec. 27, p. 1090, does not cure such defects. *Ib.*

4. COMPETENCY OF JUROR. A person who, upon examination on the *voir dire*, declares that he would not convict one accused of murder upon circumstantial evidence, or that he would have scruples in doing so, is not competent to sit as a juror upon a trial for murder. *The State v. West*, 401.

5. THE VENUE OF A HOMICIDE may be established, like any other fact, by proof of facts and circumstances tending to show where it occurred. Express testimony is not necessary. *Ib.*

6. MURDER IN THE SECOND DEGREE. To reduce the crime of homicide to murder in the second degree, it is not essential that it shall have been committed both in the heat of passion and without deliberation. It is sufficient if it was done without deliberation. *The State v. Hill*, 451.

7. MURDER IN THE FIRST DEGREE. A homicide though willful, is not murder in the first degree unless committed with deliberation; and it is a fatal error to give an instruction which ignores the element of deliberation, notwithstanding another instruction is given correctly defining the crime. *Ib.*

8. PROVOCATION, AS MITIGATING HOMICIDE. While no provocation short of personal violence or injury will be sufficient to reduce a homicide to the grade of manslaughter, yet less will suffice to mitigate or extenuate it so as to reduce the crime to murder in the second degree. *Ib.*

9. SELF DEFENSE: QUANTUM OF EVIDENCE TO SECURE ACQUITTAL. To entitle a defendant charged with murder to acquittal on the ground of self defense, he need not establish his defense by a preponderance of evidence. It will be sufficient if the evidence is such as to create, in the minds of the jury, a reasonable doubt of his guilt. (Following *State v. Alexander*, 67 Mo. 158.) *Ib.*

10. THE EVIDENCE in this case authorized an instruction in relation to murder in the first degree. *The State v. Degonia*, 485.

NEGLIGENCE.

1. RAILROAD: KILLING STOCK: SPEED OF TRAIN. The failure to stop or check a train, in order to avoid a collision with stock on the track, does not constitute negligence, where such stoppage or checking would endanger persons and property intrusted to the railroad for transportation. *Aliter*, where checking the speed of a train or stopping it would avoid the collision and could be done with safety to property and passengers. *Pryor v. The St. Louis, Kansas City & Northern Railway Company*, 215.

2. RAILROAD CROSSING: FAILURE TO RING OR WHISTLE. A way provided by a railroad company across its own grounds for ingress to and egress from its depot is not a "traveled public road or street," within the meaning of Wagner's Statutes, sections 38, 39, page 310. The requirement that the bell shall be rung or the whistle sounded whenever the locomotive approaches within eighty rods of a crossing of such street or road, does not apply to such a way. Hence, if a train in crossing such a way runs over and injures property, the liability of the company is not fixed merely by showing failure to ring the bell or sound the whistle. There must be proof of actual negligence. Such failure may, however, be shown as evidence of negligence. *Bauer v. The Kansas Pacific Railway Company*, 219.

3. CONTRIBUTORY NEGLIGENCE. If on the plaintiff's evidence, in an action to recover damages for injuries alleged to have been sustained through the negligence of the defendant, it clearly appears that the plaintiff was himself guilty of carelessness or negligence, which contributed directly to produce the injury he complains of, he cannot recover, and the court should so instruct the jury. *Nolan v. Shickle*, 336.

4. MUNICIPAL LIABILITY FOR DAMAGE BY WIND. A city is not liable in damages for injuries inflicted upon a person by the fall of a market house caused by a wind storm of unprecedented force and violence. *Flori v. The City of St. Louis*, 341.

5. CONTRIBUTORY NEGLIGENCE. When the evidence in an action of damages for injuries sustained by falling from a bridge, tends to show that the plaintiff knew that the bridge had no side-railing but, nevertheless, without taking any precautions for his safety ventured upon it on a night so dark that he could not see, and by reason of the absence of the railing fell from the bridge and sustained the injuries complained of, and the defendant pleads contributory negligence as a defense, it is error for the court to refuse to submit that defense to the jury by a proper instruction. *Staples v. The Town of Canton*, 592.

6. FAILURE of a city to erect side-railings to a bridge located in a public street, is not negligence *per se* on the part of the city. Whether it amounts to negligence in a particular case is a question for the jury to determine upon consideration of all the circumstances. *Ib.*

OF RAILROAD COMPANIES—OF RAILROAD EMPLOYEES. See Smith v. The St. Louis, Kansas City & Northern Railway Company, 32.

NEW TRIAL.

1. NEWLY DISCOVERED EVIDENCE. If a party is aware that two or more persons know facts important to be proved by him, and goes to trial without calling them as witnesses, and afterwards discovers another person who could have testified to the same facts, he cannot have a new trial on the ground of newly discovered evidence. *Hanley v. The Life Association of America*, 380.

2. IMPROPER REMARKS BY THE PROSECUTING ATTORNEY at the trial, will not authorize a reversal of the judgment, unless the attention of the trial court was called to them by the motion for new trial, especially where the record shows that as soon as they were uttered the court rebuked the attorney, and commanded him to keep within the record. *The State v. Degonia*, 485.

NOTICE.

OF CLAIM TO PROPERTY TAKEN IN EXECUTION. See Anthony to use of Deggendorf v. Bartholow, 186.

STOCKHOLDERS CHARGEABLE WITH KNOWLEDGE OF RECORDS OF THE CORPORATION. See Kitchen v. The St. Louis, Kansas City & Northern Railway Company, 224.

OF INTENTION TO USE DEPOSITION TAKEN IN ANOTHER CASE. See Adams v. Raigner, 363.

OF MOTION. See Molloy v. Batchelder, 503.

NUISANCES.

A CITY AUTHORIZED TO ABATE NUISANCES IS LIABLE FOR FAILURE TO EXERCISE THE POWER. If the authorities of a city which is authorized by its charter to declare and abate nuisances, and which has by general ordinance declared all buildings and structures dangerous to the public to be nuisances, after becoming aware of the dangerous condition of a decayed wall situated so near to a street as to imperil the lives of persons passing by on the street, neglect to cause its removal, and a child is crushed to death by the falling of the wall, the city will be held liable in damages, and this, though the wall stood on private property and the child, at the time of the fall, was not in the street, but was on private property within one foot of the street. *Kiley v. The City of Kansas*, 102.

OBSTRUCTING PUBLIC HIGHWAY.

SEE ROADS, 1.

OFFICERS.

CITY ATTORNEY: POWERS CANNOT BE DELEGATED, WHEN. The charter of the City of Kansas provided that "a warrant shall issue in favor of the city * * for a violation of any ordinance * * when any person shall make oath or affirmation that such a violation has been committed, or upon information by the city attorney." Neither the charter nor any ordinance of the city authorized the appointment of a deputy city attorney; *Held*, 1st, that the power thus provided for must be exercised by the city attorney in person, and could not be delegated to a deputy; 2nd, that a complaint made by a deputy could not afterwards be adopted by the city attorney as his own. *City of Kansas v. Flanagan*, 22.

2. CONSTABLES are State as contradistinguished from municipal officers. *The State ex rel. Attorney-General v. McKee*, 504.

CLERK OF THE CIRCUIT COURT. See Sidwell v. Birney, 144.

COUNTY COLLECTOR. See Sidwell v. Birney, 144.

SHERIFF, CONCLUSIVENESS OF HIS RETURN. See Anthony to use of Deggendorf v. Bartholow, 186; Dunham v. Wilfong, 355.

SHERIFF'S, CONSTABLE'S AND MARSHAL'S LIABILITY FOR FALSE LEVY, IN ST. LOUIS. See Dodd v. Thomas, 364.

PARTIES.

1. THE WIFE IS A NECESSARY PARTY to an action by her husband to recover her interest in trust funds. *Mertens v. Loewenberg*, 208.

2. TITLE UNDER: MECHANIC'S LIEN WHEN ENCUMBRANCERS ARE NOT MADE PARTIES. Where suit is brought to enforce a mechanic's lien against premises encumbered by a deed of trust, the parties to which are not made parties to the suit, a sale under an execution in the case will not carry an indefeasible title. The holder of the deed of trust will have the right to redeem. *Heim v. Vogel*, 529.

3. THE county is the proper party to sue on a bond given to secure a loan of township school moneys. (*State to use, &c., v. Sappington*, 68 Mo. 454.) *Lafayette County v. Hixon*, 581.

4. PARTIES TO A SUIT TO ENFORCE A TRUST: PLEADING. By the terms of a will the rents of certain real estate devised to a trustee were to be divided between certain persons named until the property should be sold, when the proceeds of the sale were to be divided among these and several other persons. In a suit brought to compel the trustee to account for rents collected and not paid over, to secure the removal of the trustee and the appointment of a successor, and to have the trust property sold and the proceeds divided; *Held*, that all the beneficiaries under the will were proper parties, notwithstanding that some of them had no interest in part of the relief sought, viz: the accounting for rents collected; *Held*, further, that a petition seeking such relief was not multifarious as to the latter class of plaintiffs. *Goodwin v. Goodwin*, 617.

PARTITION.

1. DOES NOT WORK A CHANGE OF POSSESSION FROM FRIENDLY TO ADVERSE, WHEN. Proceedings for the partition of land brought by persons holding possession under license from the true owner, and to which he is no party, followed by a sale to one of the petitioners, and continued exclusive possession by him will not give the possession an adverse character. In order to convert a friendly or subordinate into an adverse possession, in any case, the intention to make the change must be distinctly made known to the true owner. *Budd v. Collins*, 129.

2. A suit to compel a trustee to sell real estate and divide the proceeds, as directed by a will, is not a suit in partition, but a proceeding in equity to enforce a trust. *Goodwin v. Goodwin*, 617.

SALE SET ASIDE FOR FRAUD. See Henrioid v. Neusbaumer, 96.

PATENTS.

1. JURISDICTION OF STATE COURTS. State courts have the right to in-

quire into the validity of a patent for an invention issued by the United Stated when the question comes up collaterally, as where an action on a promissory note given in consideration of the assignment of an interest in a patent is defended on the ground that the patent is void. *Keith v. Hobbs*, 84.

2. ASSIGNMENT OF VOID PATENT CONSTITUTES NO CONSIDERATION. It is a good defense to an action on a promissory note given in consideration of the assignment of the right to make, use and vend a patented article within a limited territory, that while the specifications accompanying the letters patent call for water as one of the ingredients to be used in the composition of the article, the waters in common use in a portion of the territory sold, by reason of their alkaline properties, or for other reasons, will not produce the desired result. Such specifications are insufficient, the patent is void, and the assignment constitutes no consideration for the note. *Ib.*

3. EVIDENCE: COPY OF PATENT. An exemplification of a patent from the United States certified by the Commissioner of the General Land Office, is receivable in evidence without proof of the loss of the original. (*Barton v. Murrain*, 27 Mo. 235.) *Avery v. Adams*, 603.

PLEADING.

1. A PERSONAL ACTION cannot be united with one brought in a representative capacity. *Mertens v. Loewenberg*, 208.

2. ACTION ON COUNTY BONDS: REQUISITES OF PETITION. In an action on bonds issued to pay a subscription by a county to a railroad company every essential element of the power given to the county to make such a subscription, must be stated in the petition. *Weil v. Greene County*, 281.

3. FAILURE TO STATE CAUSE OF ACTION FATAL. The failure in a petition to state facts sufficient to constitute a cause of action, is radical and incurable. It is not helped by the statute of jeofails, a judgment by default or a failure to take advantage of it in the court below. *Ib.*

4. VARIANCE: ACTION EX CONTRACTU: PROOF OF TROVER AND CONVERSION, OR FRAUD AND DECEIT. A party cannot sue on a contract of sale and purchase and recover for trover and conversion, or fraud and deceit. Therefore, where plaintiff sued for the price of cattle, alleging that they were purchased by defendant C. as agent for his co-defendants M., K. & Co., and were received by M., K. & Co. and sold by them, and the proceeds appropriated to their own use; *Held*, that if it appeared that M., K. & Co. had never authorized C. to purchase for them, and that they received the cattle as the property of C., and not as their own property, they were not liable, notwithstanding it was shown that the cattle were bought by C. for their account, and at the time they were delivered to M., K. & Co. C. informed them that he had so bought them. Whether M., K. & Co. would have been liable to plaintiff in some other form of action, *quaere? Carson v. Cummings*, 325.

5. IN SUITS FOR BACK TAXES. A petition in a suit by the collector to recover back taxes, under the act of April 12th, 1877, (Sess. Acts 1877, p. 384,) should expressly allege that the land has been returned

delinquent, or has been forfeited to the State; but where it may be gathered from its allegations that such is the fact, the petition will be good after verdict. *Wellshear v. Kelley*, 343.

6. EQUITY PLEADING: FRAUDULENT CONVEYANCE. When the plaintiff basis his claim to equitable relief against several defendants on one general right, the petition is not demurrable for multifariousness, although the defendants may have separate and distinct defenses.

This principle applied to a case where plaintiff sought to have certain conveyances set aside as being in fraud of creditors. *Donovan v. Dunning*, 436.

7. THE plaintiff cannot sue upon one cause of action and recover upon another. *Clements v. Yeates*, 623.

DEMURRER. See State v. Millsaps, 359.

WHEN NOT MULTIFARIOUS IN SUIT TO ENFORCE A TRUST. See Goodwin v. Goodwin, 617.

PLEADING, CRIMINAL.

1. INDICTMENT FOR LASCIVIOUS BEHAVIOR. An indictment founded on 1 Wag. Stat., § 8, p. 500, charged that defendants, at a certain time and place, were guilty of open, gross lewdness and lascivious behavior, and were then and there guilty of open and notorious acts of public indecency, grossly scandalous, by then and there publicly, lewdly and lasciviously abiding and cohabiting with each other; *Held*, to be sufficient, (following *The State v. Bess*, 20 Mo. 419.) *The State v. Osborne*, 143.

2. INDICTMENT FOR MURDER: SEVERAL WEAPONS: SEVERAL DEFENDANTS. It is no objection to an indictment for murder, that it charges the assault to have been made with several different weapons, nor, where it is against two persons, that the acts of each are not separately stated. *The State v. Blan*, 317.

3. ——: ESSENTIAL ALLEGATIONS: JEOFAILS. An indictment for murder need not describe the wounds inflicted; but it should allege an assault, and the nature thereof, a mortal wounding of the deceased and that he died of such wounds within a year and a day. It is not sufficient to allege that defendant "did kill and murder the deceased by striking, hitting and mortally wounding him with sticks and clubs;" or that defendant "did shoot, kill and murder the deceased with loaded guns;" or that defendant "assaulted the deceased with sticks, clubs and loaded guns, and did kill and murder him, by striking him with clubs and shooting him with loaded guns." Wag. Stat., § 27, p. 1090, does not cure such defects. *Ib.*

POWERS.

1. POWER OF SALE IN FAVOR OF MOTHER AND CHILDREN, DEFECTIVE EXECUTION OF. Several deeds to a woman "and all her children she now has or ever will have," authorized her to sell the land, provided the proceeds should be invested in other land or property to be secured to her and her children. *Held*, that this power of sale did not authorize her to execute a mortgage to secure a loan of

money made to enable her to pay the purchase money of a tract of land which had been conveyed to a trustee for her use alone. *Kinney v. Mathews*, 520.

2. DEFECTIVE EXECUTION OF POWER OF SALE: EQUITABLE DOCTRINE AS TO EFFECTUATING CONVEYANCES. When a person acts for a valuable consideration, he is understood in equity to engage with the person with whom he is dealing to make the instrument as effectual as he has power to make it. Upon this principle, in a case where a person having a life estate in lands and also a restricted power of sale over the fee, for the purpose of securing a loan of money executed a mortgage purporting to convey the fee, and referring in express terms to the power, but for want of compliance with the restrictions, the mortgage was not a good execution of the power; *Held*, that it was effectual to convey the life estate. *Ib.*

PRACTICE.

1. A court to which a cause has been transferred by another court without authority of law, has no jurisdiction to enter an order of dismissal. It can do no more than strike the cause from the docket. *Ewing v. Brooks*, 49.

2. SERVICE OF SUMMONS UPON COUNTY. The mode of service of a summons upon a county is prescribed by Wag. Stat., § 6, p. 408, and is exclusive. No copy of the petition is required to be served with the writ, as in ordinary cases. *Weil v. Greene County*, 281.

3. HARMLESS ERROR IN RULING ON EVIDENCE. The trial court erroneously excluded evidence of declarations made by one of the defendants to plaintiff, but permitted the defendant, himself, to testify to the facts of which he had spoken to plaintiff, and his testimony was to the same effect as that offered by plaintiff. *Held*, that the error was harmless, and afforded no ground for reversing the judgment. *Carson v. Cummings*, 325.

4. IN BACK TAX SUITS. Judgment may be rendered at the first term in a tax suit under the act of 1877. *Wellshear v. Kelley*, 343.

5. ———. A notice of suit given in a tax case by publication examined and held to be good, at least when called in question collaterally. *Ib.*

6. A SHERIFF'S RETURN upon an alias summons showed that service had been made by delivering a true copy of the writ and petition to P. H. S., "and also an alias summons to C. O. J., he being next and last served." *Held*, that the return was informal in not stating that it was a copy of the writ which was served on C. O. J., but upon the whole return it was certain to a common intent that it was a copy. *Dunham v. Wilfong*, 355.

7. ON APPEAL FROM JUSTICE'S COURT. In an action commenced before a justice of the peace, plea of *non est factum* may be filed for the first time in the circuit court. *Moore v. Hutchinson*, 429.

8. ON MOTION TO SET ASIDE A JUDGMENT. A motion to set aside a judgment after third persons have acquired an interest in property sold under the execution, is properly denied, if such persons are not made parties or notified of the motion. *Molloy v. Batchelder*, 503.

9. HUSBAND AND WIFE: PRACTICE: JEOFAILS. A married woman cannot maintain an action alone; and where an action is so brought, and the attention of the trial court is called to the non-joinder of the husband, both by answer and by prayer for instruction to the jury, a judgment in the wife's favor will be reversed. The statute of jeofails does not cure the error. *Rodgers v. Bank of Pike County*, 560.

10. IN MANDAMUS. In a proceeding by mandamus to compel the county treasurer to pay county interest coupons out of funds in his hands, it is not necessary to file the coupons as exhibits. *The State ex rel. Lane v. Craig*, 565.

11. JURY TRIAL IN CHANCERY CAUSES. In chancery causes the right of trial by jury does not exist. The chancellor may, if he sees fit, direct issues of fact to be tried by a jury; but even then he will not be bound by their finding. *Gay v. Ihm*, 584.

12. THE plaintiff cannot sue upon one cause of action and recover upon another. *Clements v. Yeates*, 623.

IN HOMESTEAD CASES. See Creath v. Dale, 41.

AMENDMENT. See Lumpkin v. Collier, 170; Dunham v. Wilfong, 355.

PRACTICE, CRIMINAL.

1. ALIBI. When, upon the trial of an indictment for murder, the prisoner has given evidence to prove an *alibi*, it is error for the court to refuse an instruction to the effect that the jury must acquit if they have a reasonable doubt as to his absence at the time of the homicide. *The State v. Lewis*, 92.

2. ALIBI: EVIDENCE IN REBUTTAL. When evidence has been given on behalf of the prisoner to prove an *alibi*, the prosecution is entitled to offer rebutting evidence to prove his presence. *Ib.*

3. PRESENCE OF THE PRISONER. The rule that the record must affirmatively show the presence of the prisoner during the progress of the trial and at the rendition of the verdict, is sufficiently complied with if it shows that he was present at the opening of court on the day when the verdict was rendered. His absence will not be presumed until adjournment. *Ib.*

4. LIMITING THE ARGUMENT. The trial court has a discretionary power, in a criminal case, to limit counsel for the accused in argument to the jury, and to require him to close when his time has expired, and this court will not interfere with this discretion unless it is abused. *The State v. Williams*, 110.

5. CORRECTION OF ERRORS BY TRIAL COURT, ON THE SPOT, ENCOURAGED. The counsel for the accused, while addressing the jury and endeavoring to show them that his clients should not be convicted of a higher crime than murder in the second degree, was interrupted by the judge with the declaration that the instructions would not warrant a verdict of murder in the second degree; that under the instructions it was murder in the first degree or nothing. After the jury had retired to consider of their verdict, the judge, at their request, had them recalled, and, in open court and in the pres-

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ence of the accused and their counsel and of the State's attorney, gave them correct instructions in relation to murder in the second degree, and the accused were found guilty of that offense. *Held*, that no error had been committed. The accused could not have been prejudiced, and this court is inclined to encourage trial courts to correct errors committed in the progress of the trial rather than to force them to persist in them after they are discovered. *Ib.*

6. THE ACCUSED CAN WAIVE OBJECTIONS TO EVIDENCE: PRACTICE IN SUPREME COURT. A defendant in a criminal case cannot object to evidence for the first time when the case has reached the appellate court. His objections are waived unless made at the trial. The rule in *State v. Davis*, 66 Mo. 684, concerning the incapacity of a prisoner to waive his legal rights relates only to proceedings prescribed by statute for his protection. *The State v. Blan*, 317.

7. INSTRUCTIONS: HARMLESS ERROR. Defendant being indicted for stealing a mare, the court correctly instructed the jury, both on the theory that she was stolen in the county of the trial, and on the theory that she was stolen in another county and then imported into the county of trial. There was evidence that the theft was committed in the latter county. *Held*, that even if there was no evidence of larcenous taking in the other county, no error had been committed prejudicial to defendant. *The State v. Ware*, 332.

8. REMARKS BY THE PROSECUTING ATTORNEY AT THE TRIAL. Not every indiscreet remark made by the prosecuting attorney, in the presence of the jury, will furnish ground for a new trial. Certain remarks made in the present case are examined by the court and held not to warrant a reversal. *The State v. Guy*, 430.

9. JURY: CHALLENGE TO THE ARRAY. In the absence of evidence of bias or prejudice on the part of the sheriff, it is no ground for a challenge to the array, that after the court had quashed the return upon a former *venire*, because the officer who had executed it had not first taken the oath of impartiality required by statute, he had served a second *venire* by summoning as jurors the same persons who had been summoned before. HENRY, J., and SHERWOOD, C. J., dissenting. *The State v. Degonia*, 485.

10. PEREMPTORY CHALLENGES. In criminal cases the State must announce her peremptory challenges before the defendant can be compelled to make his. (Following *State v. Steeley*, 65 Mo 218.) *Ib.*

11. IMPROPER REMARKS BY THE PROSECUTING ATTORNEY, at the trial, will not authorize a reversal of the judgment, unless the attention of the trial court was called to them by the motion for new trial, especially where the record shows that as soon as they were uttered the court rebuked the attorney, and commanded him to keep within the record. *Ib.*

12. THE STATE'S RIGHT OF APPEAL IN CRIMINAL CASES. Where a motion in arrest of judgment in a criminal case has been sustained, and the prisoner ordered discharged, on the ground that at the time of the commission of the offense the defendant was a slave, and as such not liable to punishment, the State cannot appeal. Her right of appeal is limited to those cases, where, either on motion to quash, on demurrer or on motion in arrest of judgment, the indict-

ment has been adjudged to be insufficient either in form or substance. *The State v. Bollinger*, 577.

PRACTICE IN THE SUPREME COURT.

1. WHEN an information for violation of a city ordinance is fatally defective, the Supreme Court will not reverse a judgment upon it adverse to the city merely because it was prematurely rendered. It would be useless to send the case back to be ultimately dismissed. *City of Kansas v. O'Shea*, 51.

2. THE ACCUSED CAN WAIVE OBJECTIONS TO EVIDENCE. A defendant in a criminal case cannot object to evidence for the first time when the case has reached the appellate court. His objections are waived unless made at the trial. The rule in *State v. Davis*, 66 Mo. 684, concerning the incapacity of a prisoner to waive his legal rights relates only to proceedings prescribed by statute for his protection. *The State v. Blan*, 317.

3. FAILURE OF EVIDENCE: PRACTICE IN SUPREME COURT. When there is no evidence to support the judgment, the Supreme Court will order a reversal, regardless of the declarations of law given. *Moore v. Hutchinson*, 429.

4. CHANGE OF VENUE FOR PREJUDICE OF INHABITANTS: DECISION OF TRIAL COURT CONCLUSIVE. The Supreme Court will not interfere with the action of the trial court in refusing a change of venue asked on the ground of prejudice on the part of the inhabitants of the county, after evidence heard on both sides, unless it appears that palpable injustice has been done. *The State v. Guy*, 430.

PRESUMPTIONS.

1. AS TO DATE OF INDORSEMENTS. The general rule is that an indorsement of payment on a promissory note is presumed to have been made at the time the indorsement bears date; but this presumption ceases if there be any thing in the indorsement indicative of alteration. *Smith v. Ferry*, 142.

2. A CASE WHERE A DEED WAS PRESUMED. A deed from Juan Arenton to Jonathan Hillebran was the only link wanting to complete a chain of title from a concession by the Spanish Lieutenant-Governor, A. D. 1780, to the passage of the legal title from the United States in 1874. Hillebran was the brother-in-law of John Herrington, of whose name Arenton was probably a perversion, and procured a deed dated May 24th, 1800, from Robideaux, under which Arenton acquired title. At the execution of this deed Arenton was not present, although his presence was therein recited; and, contrary to the Spanish custom, his name was not signed thereto. Hillebran's name was signed to the deed, and he at once went into possession of the land thereunder. In 1808 he presented a claim to the land before the board of commissioners, in his own name as assignee of Robideaux; in 1811 he presented the claim in the name of John Herrington, as such assignee. In the first case the claim was confirmed to the legal representatives of Robideaux; and in the latter

to the legal representatives of Dorian, the original grantee. Actual possession was the main basis for the grant and confirmation under the Spanish law and the law of the United States. Three days after the latter confirmation, Hillebran conveyed the land in his own name. From the year 1800 until his death in 1864, Herrington lived in the immediate vicinity of the land, except for a period of seven or eight years, and was never heard to make any claim to the land whatsoever. Hillebran, and those claiming under him, had been in possession for nearly seventy-five years; *Held*, that the deed to Arenton was a mistake, or else Arenton had conveyed to Hillebran, and that, although the facts were singular and difficult to be explained, for the purpose and upon the principle of quieting the possession, the court sitting as a jury, was authorized to presume, and should have presumed, such a conveyance. *Brinley v. Forsythe*, 176.

3. PRESUMPTION OF KNOWLEDGE AS BETWEEN MASTER AND SERVANT. There is no presumption that a railroad company, or its superintendent of car shops, has any better means of information as to current improvements in machinery than are accessible to an experienced mechanic in the shops. *Cogney v. The Hannibal & St. Joseph Railroad Company*, 416.

IN FAVOR OF SHERIFF'S PROCEEDINGS. See Wellshear v. Kelley, 343.

IN FAVOR OF ACTS OF COURT OF GENERAL JURISDICTION. See State v. Millsaps, 359.

PRINCIPAL AND AGENT.

PROOF OF AGENCY. It does not require direct evidence to establish an agency. It may be inferred from circumstances. *Hull v. Jones*, 587.

PUBLIC OFFICER CANNOT ACT BY DEPUTY, WHEN. See City of Kansas v. Flanagan, 22.

PRINCIPAL AND SURETY.

1. BONDS: SURETIES, THEIR LIABILITIES THEREON. In a suit upon an executor's bond, it is no defense to a surety that he signed the bond upon the parol promise of the executor to procure additional sureties, and furnish the sureties with an indemnity bond. (Following *State to use, &c., v. Potter*, 63 Mo. 212, and *Brown v. Baker*, 64 Mo. 167.) *State ex rel. Wight v. Modrel*, 152.

2. RELEASE OF SURETY BY EXTENDING TIME OF PAYMENT. An agreement between the creditor and the principal debtor to extend the time for payment of the debt for a definite period, if founded upon a sufficient consideration and made without the surety's consent, will discharge the surety. Payment of interest in advance is a sufficient consideration, even if it be at a usurious rate. One who signs a note as joint maker, will be allowed the benefit of this rule as against an indorsee for value, if it appears that he is really a surety, and the note was executed by him and was taken by the indorsee with the understanding that he should occupy that position. *Stillwell v. Aaron*, 539.

3. LIABILITY OF GUARDIAN'S SURETIES. The sureties in a guardian's bond are not liable for any default which occurred before they became sureties. *Gum v. Swearingen*, 553.

4. BOND AND MORTGAGE FOR SCHOOL FUNDS: SUBSTITUTION OF NEW MORTGAGE: RIGHTS OF SURETIES. The county court has power to release a mortgage taken as security for school funds, upon receiving in its place a mortgage upon other lands, provided the change can be made without detriment to the fund. The sureties in the bond which the law requires to be taken as additional security, will not be relieved of liability by reason of the change except to the extent to which they may be injured by it. (*Saline Co. v. Buie*, 65 Mo. 63.) *Lafayette County v. Hixon*, 581.

PROCESS.

1. A SHERIFF'S RETURN upon an alias summons showed that service had been made by delivering a true copy of the writ and petition to P. H. S., "and also an alias summons to C. O. J., he being next and last served." *Held*, that the return was informal in not stating that it was a copy of the writ which was served on C. O. J., but upon the whole return it was certain to a common intent that it was a copy. *Dunham v. Wilfong*, 355.

2. JUDGMENT. A recital in a judgment that the defendants were legally served with process cuts off all inquiry in a collateral proceeding as to the legality of the service. *Ib.*

3. AMENDMENT. The validity of a judgment by default being collaterally called in question on the ground that the sheriff's return failed to show proper service of the summons, after the submission of the collateral cause, but before its decision, by leave of court, the sheriff amended his return so as to show a good service. *Held*, that this amendment was conclusive. *Ib.*

SUMMONS. See Weil v. Greene County, 281.

SERVICE BY PUBLICATION. See Wellshear v. Kelley, 343.

PROMISSORY NOTE.

1. PRESUMPTION AS TO DATE OF INDORSEMENT: ALTERATION. The general rule is, that an indorsement of payment on a promissory note is presumed to have been made at the time the indorsement bears date; but this presumption ceases if there be anything in the indorsement indicative of alteration. *Smith v. Ferry*, 142.

2. ALTERATION. Any alteration of a promissory note invalidates it in the hands of the party making the alteration, no matter how pure his motives was. *Moore v. Hutchinson*, 429.

3. CONTRACT: ACTION: PROMISSORY NOTE. By the terms of a written contract for the sale of certain cattle, a part of the purchase money was to be paid in advance. When the time for payment came the seller instead of exacting the money, accepted a note, but there

was no evidence that it was accepted as payment. Subsequently the purchaser refused to receive the cattle, alleging fraudulent misrepresentation as to their quality and condition. The seller having sued upon the note; *Held*, that he could not maintain his action. The acceptance of the note amounted only to an alteration of the original contract by extending the time of payment of the sum agreed to be paid in advance, and the plaintiff's cause of action, if any, was upon the contract for failure to take and pay for the cattle. *Thornberry v. Thompson*, 481.

4. RELEASE OF SURETY BY EXTENDING TIME OF PAYMENT. An agreement between the creditor and the principal debtor to extend the time for payment of the debt for a definite period, if founded upon a sufficient consideration and made without the surety'y consent, will discharge the surety. Payment of interest in advance is a sufficient consideration, even if it be at a usurious rate. One who signs a note as joint maker, will be allowed the benefit of this rule as against an indorsee for value, if it appears that he is really a surety, and the note was executed by him and was taken by the indorsee with the understanding that he should occupy that position. *Stillwell v. Aaron*, 539.

5. ATTACHMENT OF NOTE PREVIOUSLY TRANSFERRED AS COLLATERAL SECURITY: TRANSFER BY DELIVERY ONLY. One who takes a note as collateral security for a pre-existing debt due him from the payee, is entitled to hold it as against a subsequently attaching creditor of the payee. The fact that the note, though payable to order, is not indorsed by the payee, but is transferred by delivery only, will not affect his right. *Davis v. Carson*, 603.

PROOF OF EXECUTION. See Smith v. Witton, 458.

PUBLICATION.

SERVICE BY. See Wellshear v. Kelley, 343.

QUESTIONS OF LAW AND FACT.

1. IN A MURDER CASE. The court instructed the jury that if defendant had time to think, and did intend to kill deceased, for a moment, then the killing was a willful, deliberate and premeditated killing. *Held*, error. There may be an unlawful intentional killing which is not murder in the first degree. Hence, whether such a killing is deliberate and premeditated or not, is a question for the jury, and cannot be determined as matter of law by the court. *The State v. Williams*, 110.

2. IDENTITY OF PERSONS: PRESUMPTION IN FAVOR OF COURT OF GENERAL JURISDICTION: DEMURRER. The records of the circuit court showed that on the 8th day of October, 1875, Roach Millsaps was arrested on a charge of stealing certain property described in the warrant; that on the 20th day of October, 1875, Pharris Millsaps, Jr., as principal, with others as sureties, entered into a recognizance for the appearance of said Pharris Millsaps, Jr., at the next January term of the circuit court to answer to the charge of larceny; that at the January term Roach Millsaps was indicted for the larceny of the property described in the warrant, and that at a subsequent day of the same

term a forfeiture was ordered of the recognizance of Pharris Millsaps, Jr. On appeal from a judgment on a demurrer to a *sci. fa.* issued on the recognizance, *Held, first*, that this court would presume in favor of the acts of the circuit court that Roach Millsaps and Pharris Millsaps, Jr., were one and the same person; *Second*, but at any rate, since this was a matter of fact and not of law, a demurrer would not lie. *The State v. Millsaps*, 359.

3. WHAT IS A DEADLY WEAPON, A QUESTION FOR THE JURY. Whether a knife or a brickbat is a deadly weapon, is not a question of law to be determined on demurrer to an indictment, but a question of fact for the jury. *The State v. Harper*, 425.

RAILROADS.

1. DUTY OF COMPANIES TO EMPLOYEES AS TO MECHANICAL APPLIANCES. Railroad companies are bound to use appliances which are not defective in construction; but as between them and their employees they are not bound to use such as are of the very best or most improved description. If they use such as are in general use, that is all that can be required.

This principal applied to the use of the T rail for a guard to railroad switches, it appearing that although a guard made of U rail would be safer for employees, and would answer the purpose of the company equally well, yet the T was the one in general use. *Smith v. The St. Louis, Kansas City & Northern Railway Company*, 32.

2. EMPLOYEE'S KNOWLEDGE OF DANGER. A brakeman who continues in the service of a railroad company with knowledge that the guard of a switch is made of T rail, cannot recover for injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that if the guard had been made of a different rail it would have been less dangerous. *Ib.*

3. DAMAGE TO CATTLE; PRAIRIE LANDS. A railroad company is not liable in double damages under section 43, page 310, Wagner's Statutes, for cattle killed upon its track at a place where the adjoining lands are uninclosed lands which have been cleared of timber. Such lands are not prairie lands. *Schable v. The Hannibal & St. Joseph Railroad Company*, 91.

4. CONSOLIDATION OF RAILROADS: COUNTY BONDS. The privilege conferred upon a railroad company, by a charter granted in 1857, of having subscriptions made to it by county courts without the sanction of a popular vote, was not a vested right, and if the company became consolidated with another, this privilege did not pass to the consolidated company so as to authorize such a subscription to be made after the constitution of 1865 took effect without such sanction. *Wagner v. Meety*, 150.

5. COUNTY SUBSCRIPTION TO RAILROADS: INJUNCTION AGAINST, BY CITIZENS AND TAX-PAYERS. If a railroad company fails to comply with the conditions on which a county subscription has been made to its stock, injunction will lie to prevent it receiving bonds agreed to be issued in payment, and to compel the surrender and cancellation of any already issued; and this remedy may be invoked by any one who is a citizen and tax-payer of the county. *Ib.*

6. KILLING STOCK: SPEED OF TRAIN: NEGLIGENCE. The failure to stop or to check a train, in order to avoid a collision with stock on the track, does not constitute negligence, where such stoppage or checking would endanger persons and property intrusted to the railroad for transportation. *Aliter*, where checking the speed of a train or stopping it would avoid the collision and could be done with safety to property and passengers. *Pryor v. The St. Louis, Kansas City & Northern Railway Company*, 215.

7. RAILROAD CROSSING: FAILURE TO RING OR WHISTLE: NEGLIGENCE. A way provided by a railroad company across its own grounds for ingress to and egress from its depot is not a "traveled public road or street," within the meaning of Wagner's Statutes, sections 38, 39, page 310. The requirement that the bell shall be rung or the whistle sounded whenever the locomotive approaches within eighty rods of a crossing of such street or road, does not apply to such a way. Hence, if a train in crossing such a way runs over and injures property, the liability of the company is not fixed merely by showing failure to ring the bell or sound the whistle. There must be proof of actual negligence Such failure may, however, be shown as evidence of negligence. *Bauer v. The Kansas Pacific Railway Company*, 219.

8. RAILROAD CONSTRUCTION CONTRACT: RIGHT OF WAY. A sub-contractor for the construction of a railroad is not bound to procure the right of way; and if he is prevented from fulfilling his contract by reason of the fact that the company has not a right of way over some of the lands through which the road is to run, and the owners refuse him permission to enter and do the work, this is a sufficient excuse for his failure. *Bean v. Miller*, 384.

9. CONTRACT: PAYMENT IN INSTALLMENTS: DEFAULT OF PAYOR: RIGHTS OF CONTRACTOR. Where work is done under a contract which provides for payment by installments at stated periods, and the payments are not made, the contractor may quit the work and he will then be entitled to recover for all that he has done at the contract rates; and this notwithstanding the contract provides in express terms, that the work shall be steadily prosecuted without intermission to final completion. *Ib.*

10. PAYMENT TO BE MADE ON ENGINEER'S ESTIMATES. Where it is stipulated in a contract that the work to be done under it is to be paid for upon the estimates of an engineer, to be made at stated times, if the engineer makes only approximate estimates, and the contractor is prevented from completing the work through the fault of the other party, he may recover for the whole amount of work done, as well that of which no estimate has been made as that which has been estimated. *Ib.*

11. MASTER, WHEN NOT LIABLE TO SERVANT FOR INJURIES INFLICTED BY DANGEROUS MACHINERY. A master is not liable to his servant for injuries received in the use of dangerous machinery, notwithstanding the master may have failed to provide against the danger by the use of known appliances, where the machinery is of the kind in general use, and the danger is obvious to the senses. (*Smith v. St. Louis, Kansas City & Northern Ry. Co., ante*, p. 32.)

This principle applied to a case where the injury occurred in the use of a shaping machine, which the evidence showed was complete without a guard, and was generally so used, but could be, and was

sometimes provided with a guard or fender as a security against the negligence of workmen or possible accidents. *Cagney v. The Hannibal & St. Joseph Railroad Company*, 416.

12. CHANGE OF ROUTE: WITHDRAWAL OF TRAINS: VIOLATION OF CHARTER A QUESTION FOR THE STATE ONLY. In an action by a private citizen to recover damages from a railroad company, sustained in the depreciation of his property by such company's discontinuance of its old route for the passage of its *through* trains, and its construction of a new route for that purpose, *Held*, not competent for the citizen to raise the question that such acts of the company were in violation of its charter; such question could only be raised in an action brought by the State. (Following *Martindale v. R. R. Co.*, 60 Mo. 510.)

Per HOUGH, J.—It was competent, in such action, to inquire into the right of the company to alter the number or character of the trains formerly run over the old route; but its right so to do was clear, if it continued to furnish the public with sufficient accommodation for freight and passengers. *Kinealy v. The St. Louis, Kansas City & Northern Railway Company*, 658.

13. DAMAGES MUST BE SPECIAL AND PECULIAR, WHEN. Unless such depreciation in the value of the property was special and peculiar to the party complaining, not shared by the other members of the community, he would have no right of action. *Ib.*

14. ———: CONTRACT OR DUTY TO MAINTAIN AND OPERATE ITS ROAD, WHEN NOT IMPLIED IN FAVOR OF INDIVIDUAL CITIZEN. Where the construction and maintenance of a railroad are authorized by legislative enactments solely for the public benefit, no contract or duty to maintain its road and to continue to run its trains, will be implied, on the part of the company, in favor of a private citizen who has bought and improved lots on the line of the road under the belief that it will continue to be maintained and operated. *Ib.*

CONSTRUCTING ROAD IN PUBLIC STREET. See Swenson v. The City of Lexington, 157.

EVIDENCE IN ACTION FOR ESCAPE OF SPARKS FROM LOCOMOTIVE. See Haley v. The St. Louis,, Kansas City & Northern Railway Company, 614.

SEE STREET RAILROADS.

RECOGNIZANCE.

1. VARIANCE BETWEEN RECOGNIZANCE AND SCI. FA. A *sci. fa.* issued upon a recognizance recited that the principal defendant stood charged with the crime of petit larceny. The recognizance stated the crime to be larceny. *Held*, that there was no substantial variance. *The State v. Millsaps*, 358.

2. FORFEITURE OF RECOGNIZANCE. The cognizor in a bond conditioned for his appearance at the next term of the circuit court to answer to an indictment then to be preferred, and not to depart from the court without leave, forfeits his bond if he fails to appear, or having appeared, departs without leave, whether an indictment is found against him or not. *Ib.*

RELIGIOUS DENOMINATION.

OLD SCHOOL BAPTISTS, A DEVISE TO, VOID UNDER THE CONSTITUTION OF 1865. See Boyce v. Christian, 492.

REPLEVIN.

IN ST. LOUIS, UNDER EXECUTION LAW OF 1855. See Dodd v. Thomas, 364.

ROADS.

1. ACQUISITION OF RIGHT TO USE A ROAD BY THE PUBLIC UNDER THE STATUTE OF LIMITATIONS: OBSTRUCTING PUBLIC HIGHWAY. The public will acquire a right to the use of a road over the land of an individual, without condemnation or dedication, by long use acquiesced in by the owner, or by adverse occupancy and use for a period of time equal to that prescribed by the statute of limitations for bringing actions of ejectment. If, after it has been so used by the public for that length of time, the owner undertakes to fence across it, he will be liable to indictment and punishment as for obstructing a public highway. *The State v. Walters*, 463.

2. PUBLIC HIGHWAY, DEDICATION OF. A man cannot make a valid dedication of land belonging to his wife and children to public use as a highway. *McBeth v. Trabue*, 642.

3. ———, BY ONE OF SEVERAL TENANTS IN COMMON. A dedication by one tenant in common of a part of the common property to public use, will not bind his co-tenants, so as to prevent them from inclosing and using the part so dedicated. *Ib.*

4. ———: NO ESTOPPEL AS AGAINST MARRIED WOMEN AND INFANTS. Married women and infants will not be concluded from denying that a road laid out across their land is a public highway by reason of having traveled constantly over it and having admitted it to be public. *Ib.*

5. ———: VOID ACCEPTANCE BY COUNTY COURT. An order of the county court declaring a road to be a public highway, made at the instance of one who has no interest in the land over which it runs, and without taking the steps pointed out by the statute for acquiring land for road purposes, is a nullity as against the owner. *Ib.*

ST. LOUIS.

1. LAWYERS' LICENSE TAX: ST. LOUIS CHARTER POWERS. Section 20, of art. 10, of the constitution of 1875, by necessary implication, authorized the board of freeholders to make proper provision in the charter which they framed for the city of St. Louis, for the raising of revenue, and to that end authorized them to incorporate the provision which conferred upon the city the power to impose a license tax upon lawyers. They needed no additional authorization by the General Assembly. *City of St. Louis v. Sternberg*, 289.

2. ——: CRIMINAL PROSECUTION TO ENFORCE. The city of St. Louis has the right, under its charter, to impose, and, by criminal prosecution, to enforce penalties for the violation of the ordinance prohibiting lawyers from practicing their profession without paying a license tax. *Ib.*

3. ST. LOUIS EXECUTION LAW OF 1855: INDEMNIFYING BOND: RELEASE OF OFFICER FROM LIABILITY FOR FALSE LEVY: CONSTITUTIONAL LAW: REPLEVIN. The act of March 3rd, 1855, in relation to the sheriff, marshal and constables, of the county of St. Louis, (Acts 1855, p. 464,) provides that where any such officer shall levy any attachment or execution upon personal property, and any person other than the defendant in the suit shall claim the property and notify the officer in writing of his claim, the officer may take from the plaintiff in the writ a sufficient bond of indemnity for the benefit of the claimant, and may refuse to execute the writ until such bond is given; and if he does take such bond, then he shall not be liable to such claimant for any damages resulting from the levy. *Held*, that any claimant who gives the notice provided for by the act tacitly agrees that if the officer will take the bond, he will release him from personal liability, provided the bond be a good and sufficient one, and cannot, therefore, complain of the act as being unconstitutional in depriving him of a right of action against the officer. *Held*, also, that the act is not repealed by Wag. Stat., § 6, p. 897.

The fact that a bond has been taken as provided by the act upon notice of claim, is a bar to an action of replevin by the claimant against the sheriff for the property. *Dodd v. Thomas*, 364.

4. THE CITY OF ST. LOUIS NOT A COUNTY: COLLECTOR: MARSHAL. The city of St. Louis, as constituted by the scheme of separation, is a city proper, and not a county; and the provisions of law which were in force before its adoption, requiring the election of a county collector and county marshal for the county of St. Louis, are not applicable to the city. *The State ex rel. Burden v. Walsh*, 408.

5. CONSTABLES IN THE CITY OF ST. LOUIS: THE SCHEME AND CHARTER: GENERAL WELFARE CLAUSE. It is doubtful if the board of freeholders who framed the scheme and charter for the separation and government of the city and county of St. Louis, intended, by the general welfare clause of the charter, to confer upon the city the power to pass any ordinance that would conflict with and repeal so much of the act of March 24th, 1875, concerning constables, as relates to the city of St. Louis; but if they did, they transcended the powers given them by article 9 of the Constitution. Ordinance No. 10,744, providing for the election of constables in the city of St. Louis, being in conflict with this act, is, therefore, void, and persons elected under it are not entitled to fill the office of constable. *The State ex rel. Attorney-General v. McKee*, 504.

6. JUSTICES OF THE PEACE IN THE CITY OF ST. LOUIS; LOCAL LAWS. The act of April 27th, 1877, providing for the election of justices of the peace in the city of St. Louis, (Acts 1877, p. 283,) is not such a local law as falls within the prohibitions of sections 53 and 54, article 4 of the constitution of 1875, against the enactment of a local law where a general law can be made applicable, or until notice of intention to apply for its enactment shall have been published in the locality to be affected. *The State ex rel. Monahan v. Walton*, 556.

7. ———: UNDER THE CONSTITUTION OF 1875. The city of St. Louis, as constituted under the scheme and charter, not being a county, section 37, article 6 of the constitution of 1875 does not make it obligatory on the Legislature to provide for the election of justices of the peace there; but taken in connection with section 25, article 9, it does confer the authority to do so. *Ib.*

STREET RAILROADS IN. See St. Louis Railroad Company v. Northwestern St. Louis Railway Company, 65.

SALE.

BY TRUSTEE TO HIMSELF AND ASSOCIATES, VOIDABLE, BUT NOT VOID. See Kitchen v. The St. Louis, Kansas City & Northern Railway Company, 224.

SCHEME AND CHARTER.

SEE ST. LOUIS.

SCHOOLS.

1. PUBLIC SCHOOL PROPERTY EXEMPT FROM EXECUTION. It would be against the policy of our laws to permit the property of a board of education, held for public school purposes, to be taken in execution at the suit of a creditor. *The State to use of the Board of Education v. Tiedemann*, 306.

2. BOARD OF EDUCATION: MECHANIC'S LIEN: BREACH OF BUILDER'S BOND. A board of education having contracted with a builder for the erection of a public school house, took from him a bond conditioned to secure the faithful performance of the contract. The builder having procured materials to be furnished and work to be done on the building, failed to pay for them, whereupon the laborers and material men brought their actions to enforce mechanics' liens against the building, and obtained judgments, and the board paid the judgments. In an action on the bond; *Held*, that these facts constituted a breach of its conditions, and the board was entitled to recover the amounts so paid. *The State to use of the Board of Education v. Tiedemann*, 515.

3. BOND AND MORTGAGE FOR SCHOOL FUND: SUBSTITUTION OF NEW MORTGAGE: RIGHTS OF SURETIES. The county court has power to release a mortgage taken as security for school funds, upon receiving in its place a mortgage upon other lands, provided the change can be made without detriment to the fund. The sureties in the bond which the law requires to be taken as additional security, will not be relieved of liability by reason of the change except to the extent to which they may be injured by it. (*Saline Co. v. Buie*, 65 Mo. 63.) *Lafayette County v. Hixon*, 581.

4. TOWNSHIP SCHOOL FUNDS; PARTIES. The county is the proper party to sue on a bond given to secure a loan of township school moneys. (*State to use, &c., v. Sappington*, 68 Mo. 454.) *Ib.*

SEAL.

COUNTY CLERK'S CERTIFICATE OF COLLECTOR'S DELINQUENCY, IF UNSEALED, CONFERS NO LIEN. An abstract of a settlement of a delinquent collector with the county court was filed with the clerk of the circuit court attested thus: "Witness my hand this 17th day of August, 1863. J. O. Jewett, county clerk Schuyler county, Missouri." The statute provided that when such a settlement was filed with the clerk of the circuit court, certified by the clerk of the county court under his hand *and seal of office*, it should operate a lien upon the real estate of the collector, and could be carried into effect in the same manner and with like effect as a judgment of the circuit court; *Held*, that the statute should be strictly construed, and as the certificate in question lacked the seal of the county court, it conferred no lien, and no execution could issue on it. *Sidwell v. Birney*, 144.

REFORMATION OF DEED BY ADDITION OF SEAL. See Michel v. Tinsley, 442.

SHERIFF.

1. HIS RETURN ON EXECUTION, WHEN CONCLUSIVE. In a suit upon a bond given by the plaintiff in an execution to the sheriff to indemnify him for the seizure and sale under the execution of property claimed by a third party, the sheriff's return is conclusive upon the plaintiff in the execution, as to the fact of a levy upon the property, in favor of the claimant. *Burgert v. Borchert*, 59 Mo. 80, distinguished. *Anthony to use of Deggendorf v. Bartholow*, 186.

2. PRESUMPTIONS IN FAVOR OF SHERIFF'S PROCEEDINGS. It seems that the same presumptions exist in favor of the validity of the proceedings of a sheriff in enforcing an execution from the circuit court in a tax case, as in other cases. *Wellshear v. Kelley*, 343.

AMENDMENT OF HIS RETURN ON EXECUTION. See Dunham v. Wilfong, 355.

HOW RELIEVED FROM LIABILITY FOR FALSE LEVY, IN ST. LOUIS. See Dodd v. Thomas, 364.

CONTEMPT ON THE PART OF. See State v. West, 401.

SPECIAL JUDGE.

DURATION OF HIS POWERS. Under the act of May 19th, 1877, (Acts 1877, p. 357,) the powers of a special judge continue until the final determination of the cause for which he is chosen. A continuance of the cause to a subsequent term does not abate them. *The State v. Davidson*, 509.

SPECIAL TAX BILL.

REDEMPTION FROM SALE UNDER, BY INCUMBRANCER NOT MADE PARTY TO SUIT. See Olmstead v. Tarsney, 396.

STATUTES.

1. INJUNCTION will issue to prevent the invasion of a right secured by statute without proof of damage. *St. Louis Railroad Company v. Northwestern St. Louis Railway Company*, 65.

2. TITLE OF STATUTE: CONSTITUTIONAL LAW. Under the title "An act to consolidate into one act the various acts in relation to the charter of the city of Hannibal" any legislation relating to the city of Hannibal may be enacted without violating § 32 of article 4 of the constitution. That section prohibits the enactment of any law relating to more than one subject and requires the subject to be expressed in the title. The insertion in an act entitled as above, of a requirement that the county in which the city is situated, in a certain contingency shall pay to the city a certain portion of the taxes collected for county purposes, does not render the act obnoxious to this provision of the constitution. *The City of Hannibal v. The County of Marion*, 571.

REPEAL OF CITY ORDINANCE WITH EXCEPTIONS. See City of Kansas v. White, 26.

CONFERRING A LIEN, STRICTLY CONSTRUED. See Sidwell v. Birney, 144.

STATUTES CONSTRUED.

WAGNER'S STATUTES OF 1872.

Page 192, § 52, See Attachment, 1.
Page 310, §§ 38, 39, See Railroads, 7.
Page 310, § 43, See Railroads, 3.
Page 327, § 31, See Eminent Domain, 2.
Page 408, § 6, See Practice, 2.
Page 500, § 8, See Lascivious Behavior, 1.
Page 520, §§ 2, 3, See Damages, 4
Page 561, § 20, See Judgment, 1.
Page 561, § 20, See Jurisdiction, 1.
Page 642, § 3, See Landlord and Tenant, 1.
Page 646, § 27, See Landlord and Tenant, 1.
Page 846, §§ 1, 2, See Justices' Courts, 1.
Page 849, § 10, See Justices' Courts, 4.
Page 897, § 6 See Execution, 7.
Page 935, § 24, See Exemption, 1.
Page 1035, § 7, See Amendment, 1.
Page 1039, § 6, Continuance, 2.
Page 1040, § 8, See Continuance, 2.
Page 1090, § 27, See Murder, 3.
Page 1164, § 31, See Tax, 14.
Page 1165, § 34, See Tax, 15.
Page 1297, See Strays, 1.
Page 1369, § 34, See Wills, 2.

GENERAL STATUTES OF 1865.

Page 569, § 58, See Judgment, 3.
Page 182, See Judgment, 4.
Page 248, § 8, See Town Plat, 1.

REVISED STATUTES OF 1855.

Page 524, §§ 7, 8, See County Collector, 1.

ACTS OF 1877.

Page 283, See St. Louis, 6.
Page 357, See Special Judge.
Page 384, See Tax, 3.

ACTS OF 1875.

Page 61, See Husband and Wife, 4.
Page 196, See Kansas City, 1.

ACTS OF 1874.

Page 327, See Kansas City, 1, 2.

ACTS OF 1865-6.

Page 84, See Courts, 2.

ACTS OF 1860.

Page 441, § 4, See Eminent Domain, 2.

ACTS OF 1855.

Page 464, See Execution, 7.

ACTS OF 1853.

Page 357, §§ 8, 9, See Eminent Domain, 2.

STATUTE OF FRAUDS.

1. VENDOR'S LIEN: SUBROGATION: DEBTOR AND CREDITOR. One who

lends money to another to enable him to pay off a note given for the purchase money of land, is not entitled to be subrogated to the lien of the vendor. He stands in the same position as any other creditor. *Wooldridge v. Scott*, 669.

2. STATUTE OF FRAUDS: FRAUD: EQUITY. The fact that at the time the loan was made the borrower promised that he would give a lien on the land, will not change the foregoing rule, if the promise was merely verbal and was not made with any purpose of obtaining an advantage and then breaking faith with the lender.

If the promise were made for such fraudulent purpose, it seems a court of equity would interfere to enforce it, notwithstanding it was not in writing, provided it embraced an express agreement for the execution of a writing. *Ib.*

STRAYS.

STATUTE CONSTRUED. The rights of parties under the statute concerning strays, (Wag. Stat., chap. 131, p. 1297,) are not affected by the fact that the owner had long been accustomed to allow his cattle to run at large in the neighborhood where they were taken up, or that the person finding them on his property knew who was their owner. *Worthington v. Brent*, 205.

STREETS.

1. EJECTMENT TO RECOVER A STREET-WAY. The owner of land wrongfully taken by a city and converted into and used as a public street, may maintain ejectment against the city for its recovery. *Armstrong v. The City of St. Louis*, 309.

2. DAMAGES IN EJECTMENT: BENEFITS FROM STREET OPENING. In ejectment to recover land wrongfully appropriated by a city for a street, the jury have no right to consider the benefits accrued to the plaintiff by reason of the making of the street, in reduction of damages. *Ib.*

PUBLIC NUISANCE NEAR. See Kiley v. The City of Kansas, 102.

DAMAGE BY OBSTRUCTIONS IN. See Swenson v. The City of Lexington, 157.

DEDICATED ON TOWN PLAT. See the Town of Cameron v. Stephenson, 372.

STREET RAILROADS.

IN ST. LOUIS: PARALLEL LINES. The act of January 16th, 1860, (Sess. Acts 1859–60, p. 516,) after confirming the St. Louis Railroad Company, the Peoples' Railway Company and the Citizens' Railway Company in the enjoyment of the franchises which they were then exercising, provided that "no street railroad shall hereafter be constructed in the city of St. Louis nearer to a parallel road than the third parallel street from any road now constructed or

which may hereafter be constructed, except the roads hereinbefore mentioned." In a suit by the St. Louis Railroad Company to enjoin another company from building its road upon a street parallel to the one occupied by its line and next to it; *Held*, that this act prohibited the construction of any parallel lines of street railroads in the city of St. Louis within three blocks of each other, but excepted the three companies named from the operation of this prohibition so far as to permit them to construct their roads within that distance of each other, but not of the roads of any other companies; *Held, further*, that in determining what were parallel roads within the meaning of the act, neither the relative location of the termini nor the general direction of the entire line of the roads could be regarded as controlling circumstances; nor was it necessary that every part, or even the greater part, of the two roads should be parallel; and it appearing that the general direction of the two contending roads was substantially the same for nearly two miles, and for half a mile of that distance they were exactly parallel, it was held that they were to be deemed parallel roads, notwithstanding that their termini were wide apart and the general direction of one was from northwest to southeast, while that of the other was from north to south. *St Louis Railroad Company v. Northwestern St. Louis Railway Company*, 65.

SUBROGATION.

VENDOR'S LIEN: SUBROGATION: DEBTOR AND CREDITOR. One who lends money to another to enable him to pay off a note given for the purchase money of land, is not entitled to be subrogated to the lien of the vendor. He stands in the same position as any other creditor. *Wooldridge v. Scott*, 669.

SUMMONS.

SEE PRACTICE, 2.

TAX.

1. THE STATE'S RIGHT TO TAX LAWYERS. The power of the State to impose a license tax on lawyers has been beyond question ever since the decision of this court in *The State v. Simmons*, 12 Mo. 268. *The City of St. Louis v. Sternberg*, 289.

2. LAWYERS' LICENSE TAX: UNIFORMITY OF TAXATION. The ordinance of the city of St. Louis imposing a tax of $25 a year on every lawyer in the city without reference to the value of his practice, is not obnoxious to the constitutional provision which requires that taxation shall be uniform. When a municipality having power to tax callings, trades and professions, taxes alike all persons engaged in the same business, such taxation is equal and uniform. *American Union Express Co. v. St. Joseph*, 66 Mo. 675. *Ib.*

3. SUIT FOR BACK TAXES: PLEADING. A petition in a suit by the collector to recover back taxes, under the act of April 12th, 1877, (Sess. Acts 1877, p. 384,) should expressly allege that the land had been returned delinquent, or had been forfeited to the State; but where

it may be gathered from its allegations that such is the fact, the petition will be good after verdict. *Wellshear v. Kelley*, 343.

4. JUDGMENT NOT COLLATERALLY ASSAILABLE. The validity of a judgment rendered in a suit brought by the collector to recover back taxes, cannot be attacked in a collateral proceeding for defect of the petition in that case in failing to allege that the land had been returned delinquent, or had been forfeited to the State, or in failing to allege that the county clerk, within the time provided by the act, had made out a back tax book and delivered it to the collector, and that the land was contained in this book, and remained unredeemed, or in failing to allege that the suit was against the owner of the land. *Ib.*

5. JURISDICTION OF THE CIRCUIT COURT. The circuit court has jurisdiction, under the act of 1877, to hear and determine suits for back taxes. *Ib.*

6. ———: JUDGMENT NOT COLLATERALLY ASSAILABLE: LIMITATIONS. The validity of a judgment rendered in such a suit cannot be attacked in a collateral proceeding by showing that it appeared upon the face of the petition in that case that a portion of the taxes sued for and embraced in the judgment, were barred by the statute of limitations, supposing that statute to be a good defense as against the State. *Ib.*

7. ———: PRESUMPTIONS IN FAVOR OF SHERIFF'S PROCEEDINGS. It seems that the same presumptions exist in favor of the validity of the proceedings of a sheriff in enforcing an execution from the circuit court in a tax case, as in other cases. *Ib.*

8. ———: PRACTICE. Judgment may be rendered at the first term in a tax suit under the act of 1877. *Ib.*

9. ———: PROCESS. A notice of suit given in a tax case by publication examined and held to be good, at least when called in question collaterally. *Ib.*

10. BACK TAX ACT CONSTITUTIONAL. The act of 1877 to provide for collection of delinquent taxes, is not unconstitutional as being retrospective in its operation. *Ib.*

11. EXECUTION SALE FOR TAXES: EJECTMENT. The fact that at a sale under execution in a tax case the sheriff failed to sell the land by its smallest legal subdivisions, is no defense to an action of ejectment brought by the purchaser to recover possession. *Ib.*

12. ESTOPPEL AGAINST DISPUTING ILLEGAL TAXATION. Payment of town taxes for a period of five years by the owners of land not legally liable to such taxation, submission for a like period to the exercise of jurisdiction by the town authorities in other matters, and participation in an election at which a subscription to a railroad company was voted by the town, in payment of which bonds were subsequently issued, are not sufficient by themselves to estop such persons from disputing the legality of such taxation. *The Town of Cameron v. Stephenson*, 372.

13. TAXABILITY OF MUNICIPAL BONDS KEPT OUT OF THE STATE. When

municipal bonds belonging to a person who has his domicile in this State, are sent into another State, not for the purpose of avoiding taxation, but for safe-keeping, they cease to be taxable here. This is the general doctrine, and the principle is embodied in the Revenue Act of 1872. Wag. Stat., § 31, 1164. *The State ex rel. Dunnica v. The County Court of Howard County*, 454.

14. TREBLE TAXATION BY WAY OF PENALTY FOR FRAUD: SUMMARY PROCEEDINGS: TRIAL BY JURY: DUE PROCESS OF LAW. Section 34 of the revenue law, (Wag. Stat., p. 1165,) provides in substance that upon complaint from the assessor that any person has given in a false list of his property for taxation, with intent to defraud, the board of equalization shall notify the party of the charge, specifying the particulars in which the list is alleged to be false, and shall fix a time for a hearing, when the party shall have the right to appear and defend; and if the charge is sustained, it shall be the duty of the board to ascertain the true amount and value of all his property subject to taxation, and, by way of penalty for furnishing the false list, to assess a treble tax against him. The board of equalization consists of the three judges of the county court, the county assessor and the county surveyor, and its decision is final, except that for error apparent upon the face of the proceedings *certiorari* will lie to the circuit court; *Held*, that the act is not unconstitutional, either as depriving the accused of the right of trial by jury, or as depriving him of his property without due process of law. *The State ex rel. Ferguson v. Moss*, 495.

15. VENDOR AND VENDEE: LIABILITY FOR TAXES. A vendee of real estate in possession under a contract of sale is liable, as between himself and the vendor, for all taxes assessed after the commencement of his possession, and the fact that by the contract the vendor is bound to make him a warranty deed upon payment of the purchase money, does not change this rule. *Farber v. Purdy*, 601.

EXTENDED TOWN LIMITS—NO LIABILITY TO TOWN TAXATION, WHEN. See the Town of Cameron v. Stephenson, 372.

TENDER.

1. EFFECT OF: SPECIAL TAX BILL, REDEMPTION FROM SALE UNDER: DEED OF TRUST, DISTRIBUTION OF PROCEEDS OF SALE UNDER. On a bill of interpleader filed by a trustee to determine the disposition of a fund arising from a sale of land under a deed of trust in favor of one A, the following state of facts appeared: After the execution of the deed of trust, suit was brought and judgment was obtained against the land upon a special tax bill, the lien of which ante-dated the deed of trust. There was a sale under the judgment and B became the purchaser; A was not made party to this suit. Pending these proceedings, a second deed of trust was executed; and finally a judgment was obtained for the enforcement of a mechanic's lien against the land and its improvements. By the act under which the special tax bill was issued, any one interested in land, if he claimed under a part defendant in a suit on such a bill, by a title which accrued before suit brought, and was not himself made party to the suit, had a right to redeem from a purchaser at a sale under a judgment on the bill. Before the sale under the deed of trust A offered to redeem the land, and tendered to B the amount due, but the tender was refused. *Held, first*, that the tender did not divest B's

title. He still held subject to A's right to redeem, a right which could be enforced by petition in equity. *Second*, That B was entitled to no part of the fund. What remained after satisfying the first deed of trust and the junior incumbrances, should go to the original owners of the land. *Olmstead v. Tarsney*, 396.

2. TENDER OF RENT BEFORE FORFEITURE OF LEASE IS DECLARED. A declaration of forfeiture by a landlord, under a clause in the lease authorizing him to declare a forfeiture in case of non-payment of rent for a stated length of time, will be ineffectual, if, before the declaration is made, though after the expiration of the stated time, the tenant makes a tender of all rent then in arrear. *Lewis v. The City of St Louis*, 595.

TORTS.

1. THE RIGHT TO DEFEND ONE'S PERSON AND PROPERTY. Every man has a right to defend his premises from intrusion as well as his person from attack, and for that purpose to employ such force as may reasonably appear to him to be necessary; and if in the use of such force fatal consequences unexpectedly ensue to the intruding or attacking party, he is not answerable for them. *Morgan v. Durfee*, 469.

2. ——— ONE'S PLACE OF BUSINESS. One's business office is *pro hac vice* his dwelling, and the owner has the same right to use force in defending it against intrusion as he has in defending his dwelling. *Ib.*

3. LIABILITY FOR CONSEQUENCES OF OPPOSING FORCE TO FORCE. Where one resists, by force, the violence of a hostile intruder, directed against both his person and his property, he is responsible only for the natural and probable consequences of his act, and not for any unforeseen and unfortunate consequences. *Ib.*

TOWN PLAT.

MUNICIPAL TAXATION: EXTENSION OF TOWN LIMITS: TOWN PLATS. When the owner of land adjacent to an incorporated town subdivides it into lots and blocks, and files a plat of the subdivision in the recorder's office of the county, under section 8, page 248, General Statutes 1865, the fee of such portions as are designed for streets and other public uses becomes vested in the town, but the addition does not become incorporated into the town so as to make the land liable to taxation for town purposes. *The Town of Cameron v. Stephenson*, 372.

TRUSTS.

1. TRUSTEE'S STATEMENTS, AS EVIDENCE AGAINST CESTUI QUE TRUST. Statements made by a trustee cannot be treated as admissions of the *cestui que trust*, and are not binding upon the latter unless made by his authority. *Eitelgeorge v. Mutual House Building Association*, 52.

2. THE WIFE IS A NECESSARY PARTY to an action by her husband to recover her interest in trust funds. *Mertens v. Loewenberg*, 208.

3. TRUSTEE MUST BE PRESENT THROUGHOUT THE SALE. When a sale is made under a deed of trust, it is the duty of the trustee to be present for the purpose of observing its progress, protecting the interests of the parties concerned, rejecting fraudulent bids, and if necessary, adjourning the sale; and he must be present during the whole sale. It is not sufficient that he is present at its opening and close, if he absents himself during its progress. *Brickenkamp v. Rees*, 426.

4. CONSTRUCTIVE FRAUD: SECRET RESERVATION OF USE. The fact that the grantor in a deed, absolute on its face, by a secret contemporaneous instrument reserves to himself, for life, the use of the property conveyed, is evincive of legal, if not actual fraud. *Donovan v. Dunning*, 436.

5. A TRUSTEE'S POSSESSION NOT ADVERSE TO BENEFICIARY. The possession of a trustee will not be deemed adverse as against his *cestui que trust*, unless there has been an open disavowal of the trust fully and unequivocally made known to the beneficiary. The application by the trustee of the whole income of the trust property to his own use for a period of twelve years, does not, it seems, amount to such disavowal. *Goodwin v. Goodwin*, 617.

6. PARTITION: TRUST. A suit to compel a trustee to sell real estate and divide the proceeds, as directed by a will, is not a suit in partition, but a proceeding in equity to enforce a trust. *Ib.*

7. PARTIES TO A SUIT TO ENFORCE A TRUST: PLEADING. By the terms of a will the rents of certain real estate devised to a trustee were to be divided between certain persons named until the property should be sold, when the proceeds of the sale were to be divided among these and several other persons. In a suit brought to compel the trustee to account for rents collected and not paid over, to secure the removal of the trustee and the appointment of a successor, and to have the trust property sold and the proceeds divided; *Held*, that all the beneficiaries under the will were proper parties, notwithstanding that some of them had no interest in part of the relief sought, viz: the accounting for rents collected; *Held*, further, that a petition seeking such relief was not multifarious as to the latter class of plaintiffs. *Ib.*

TRUSTEE SELLING TO HIMSELF AND ASSOCIATES—ACQUIESCENCE OF CESTUI QUE TRUST. See Kitchen v. The St. Louis, Kansas City & Northern Railway Company, 224.

VARIANCE.

1. VARIANCE: ACTION EX CONTRACTU: PROOF OF TROVER AND CONVERSION, OR FRAUD AND DECEIT. A party cannot sue on a contract of sale and purchase and recover for trover and conversion, or fraud and deceit. Therefore, where plaintiff sued for the price of cattle, alleging that they were purchased by defendant C. as agent for his co-defendants M., K. & Co., and were received by M., K. & Co. and sold by them, and the proceeds appropriated to their own use; *Held*, that if it appeared that M., K. & Co. had never authorized C. to purchase for them, and that they received the cattle as the property of C., and not as their own property, they were not liable, notwithstanding it was shown that the cattle were bought by C. for

their account, and at the time they were delivered to M., K. & Co. C. informed them that he had so bought them. Whether M., K. & Co. would have been liable to plaintiff in some other form of action, *quaere?* *Carson v. Cummings*, 325.

2. BETWEEN RECOGNIZANCE AND SCI. FA. A *sci. fa.* issued upon a recognizance recited that the principal defendant stood charged with the crime of petit larceny. The recognizance stated the crime to be larceny. *Held*, that there was no substantial variance. *The State v. Millsaps*, 359.

VENDOR'S LIEN.

1, SUBROGATION: DEBTOR AND CREDITOR. One who lends money to another to enable him to pay off a note given for the purchase money of land, is not entitled to be subrogated to the lien of the vendor. He stands in the same position as any other creditor. *Wooldridge v. Scott*, 669.

2. STATUTE OF FRAUDS: FRAUD: EQUITY. The fact that at the time the loan was made the borrower promised that he would give a lien on the land, will not change the foregoing rule, if the promise was merely verbal and was not made with any purpose of obtaining an advantage and then breaking faith with the lender.

If the promise were made for such fraudulent purpose, it seems a court of equity would interfere to enforce it, notwithstanding it was not in writing, provided it embraced an express agreement for the execution of a writing. *Ib.*

VENDOR AND VENDEE.

LIABILITY FOR TAXES. A vendee of real estate in possession under a contract of sale is liable, as between himself and the vendor, for all taxes assessed after the commencement of his possession, and the fact that by the contract the vendor is bound to make him a warranty deed upon payment of the purchase money, does not change this rule. *Farber v. Purdy*, 601.

VENUE.

1. CHANGE OF VENUE TO PETTIS CRIMINAL COURT. Under the act establishing the criminal court of the sixth judicial circuit and Johnson county, it was not necessary that an order awarding a change of venue in a criminal case to any county over which that court had jurisdiction should designate it as the court to which the case should go. As soon as the change was awarded, it became the duty of the clerk to certify the case to that court, without special directions to that effect. *The State v. Williams*, 110.

2. BILL OF EXCEPTIONS: CHANGE OF VENUE. Exceptions to the action of the trial court in refusing to allow a change of venue, will not be noticed by the Supreme Court unless preserved by a bill of exceptions taken at the term at which the change is refused. *The State v. Ware*, 332.

3. THE VENUE OF A HOMICIDE may be established, like any other fact, by proof of facts and circumstances tending to show where it occurred. Express testimony is not necessary. *The State v. West*, 401.

4. CHANGE OF VENUE FOR PREJUDICE OF INHABITANTS: DECISION OF TRIAL COURT CONCLUSIVE. The Supreme Court will not interfere with the action of the trial court in refusing a change of venue asked on the ground of prejudice on the part of the inhabitants of the county, after evidence heard on both sides, unless it appears that palpable injustice has been done. *The State v. Guy*, 430.

VERDICT.

1. THE verdict of a jury cannot be impeached by the testimony of one of its members. *Philips v. Stewart*, 149.

2. GENERAL VERDICT: ONE GOOD COUNT. The rule is settled that where there are several counts charging the same offense, one good count will sustain a general verdict of guilty. *The State v. Blan*, 317.

3. INTOXICATING LIQUOR IN THE JURY ROOM: CONTEMPT. It is improper, and should be held a contempt of court for any officer to furnish the jurors engaged in the trial of a cause with intoxicating liquor But in the absence of proof of intoxication or other improper conduct on their part, the fact that such liquor has been furnished to them, and used by them, is no ground for setting aside a verdict. *The State v. West*, 401.

4. THE fact that the officer having a jury in charge furnished the jurors with cigars, is no ground for setting aside the verdict; neither is the fact that during a recess of the court a stranger was in the room where the jury was kept by the sheriff, it appearing that nothing whatever was said about the cause on trial. *The State v. Degonia*, 485.

WAIVER.

OF EXEMPTION BY MARRIED WOMAN. See Abernathy v. Whitehead, 28.

OF CONSTITUTIONAL QUESTION BY ACT OF PARTIES. See Dodd v. Thomas, 364.

OF RIGHT TO FORFEIT INSURANCE. See Hanley v. The Life Association of America, 380.

WAR POWER OF THE UNITED STATES.

CONFISCATION OF RENTS BY MILITARY AUTHORITIES: CONSTITUTIONAL LAW, FEDERAL AND STATE. The court adheres to its decision in this case heretofore reported in 64 Mo. 564, against the validity of the act of Congress of March 3rd, 1863, under which the plaintiff's rents were confiscated by the military authorities of the United States.

The court also holds that no defense can be made to the action, based on section 4, article 11 of the Missouri Constitution of 1865. A State can no more deprive an owner of his property without due process of law by constitutional provision than by an ordinary act of legislation. *Clark v. Mitchell*, 627.

WILLS.

1. DEVISE TO OLD SCHOOL BAPTISTS VOID UNDER THE CONSTITUTION OF 1865. The Old School Baptist Church of Flint Hill, in Ralls county, Missouri, is a religious sect, order or denomination within the meaning of section 13, article 1, of the Constitution of 1865, and was, therefore, not incapable under that section of receiving a devise, notwithstanding it was but a local congregation uncontrolled by any general ecclesiastical organization. *Boyce v. Christian*, 492.

2. EVIDENCE: FOREIGN PROBATE OF WILL, A JUDICIAL PROCEEDING: STATUTE CONSTRUED. The probate of a will in another State is a judicial proceeding, to the record of which full faith and credit is to be given when certified in conformity to the act of Congress of 1790.

It is not necessary to the admission of such will and the probate thereof in evidence, that they shall have first been recorded in this State, as permitted by section 34 of the statute of wills, (Wag. Stat., p. 1369). *Lewis v. The City of St. Louis*, 595.

3. WILL CONSTRUED. A testatrix directed, by her will, that her debts should be paid out of the first moneys that might come to hand either from the rent of her house or from other sources. She then devised her house to her son as trustee, directing that he should be the legal owner of it for fifteen years from and after her death; that he should have exclusive control and management of it, receive any moneys that might be in the hands of her administrator upon final settlement of her estate, receive the rents of the house, and after paying taxes, insurance and other expenses, should divide the remainder annually among certain named persons, and, at the expiration of the fifteen years, should sell the house and divide the proceeds among these and certain other persons. The rents for three years after the death of the testatrix having been taken to pay her debts, it was insisted that the trustee was entitled to hold for three years beyond the lapse of fifteen years from the death of the testatrix. *Held, contra*, that that was not the meaning of the will. *Goodwin v. Goodwin*, 617.

WITNESS.

A person is not disqualified as a witness because, before he is called the prosecuting attorney has promised to dismiss an indictment then pending against him, after he shall have given his testimony. *The State v. West*, 401.